No. 2251

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

UNITED ENGINEERING WORKS
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.

Filed this.....day of August, 1913.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANT.

The issue in this case is the value of certain repair work done to the S. S. "Hilonian" in August and September, 1909. With minor exceptions the items of Schedules 2 to 10 attached to the libel are admitted as correct, the main controversy being over libelant's charges as shown by Schedule 1. On this schedule suit has been brought on a quantum meruit while respondent sets up a contract. The evidence was all taken before a commissioner, and there are few points of law involved.

Facts of the Case.

The steamer, being in need of certain repairs, respondent caused specifications to be drawn by her chief engineer, Carl E. Klitgaard, which were duly submitted for bids to the Union Iron Works, the Risdon Iron Works and the libelant. Upon receipt of bids from these concerns they were opened in the presence of representatives of the respective bidders and all rejected because unsatisfactory as to price. New bids on the same specifications were then called for and were received from the Union Iron Works and the libelant. At this time libelant was already under contract to perform for the "Hilonian" certain minor repair jobs, and it was the desire to have the vessel placed in its yards, that these minor contracts might be completed, that led it to reduce its former bid of $11,999.00 to $11,749.00. At the time the specifications were prepared on which these bids were made, there existed a doubt as to whether it would be necessary to remove from the ship her crank shaft. This constituted a large item of the specifications and, in accepting libelant's second bid, it was with the understanding that, if it was found unnecessary to remove the crank shaft, the respondent was to receive an appropriate credit and, in order that there might be a proper ascertainment of the amount of this credit, respondent was to employ a capable engineer to act as time keeper on the job. Among the engineers suggested by libelant for this position was Mr. E. L. Putzar, formerly connected with the Oceanic Steamship Co., who was ultimately appointed by respondent to fill the suggested position. At

the time of the acceptance of libelant's bid, it was still deemed by Capt. Matson to be a high figure, and Putzar's appointment was partly influenced by a desire to know whether this belief was well founded or not. In furtherance of the contract thus entered into the "Hilonian" was delivered to libelant for the purpose of said repair work which, according to the contract, was to be completed within twenty-five calendar days.

Upon investigation it was determined that the vessel's crank shaft need not be removed, and the other specification work was thereafter proceeded with contemporaneously with the work on the minor contracts above referred to. As the job progressed some of the items of work called for by the specifications were decided to be unnecessary, and the object sought to be accomplished by other items was accomplished by doing the work in a different way from that called for. As for the items found to be unnecessary, respondent claims that these, by mutual agreement at the time, were replaced or substituted by other work of equal value and, as to items accomplished by methods differing from those called for by the specifications, that these too were specifically and mutually agreed to before the changes were undertaken. During the progress of the job, other work not called for or connected in any way with the specifications was performed without any agreement as to price, and also the several items of work at agreed prices, which form the subject matter of the undisputed schedules of the libel, were undertaken. In the work (besides the timekeeper, Putzar) respondent was represented by Chief Engineer Klit-

gaard and Capt. Saunders, its port superintendent. The chief representatives of the libelant were its general foreman, L. Wilhelmson, and L. K. Siverson, foreman in charge of engine room work on the ship.

The vessel was delivered to the libelant on the morning of August 23rd on this side of the bay, where workmen from libelant's yards boarded her and commenced work in preparation for dismantling the ship's engines. Steaming early that morning to the yards of the libelant on the other side of the bay, other workmen were there waiting the ship's arrival. In the latter part of the work, and in accordance with the specifications, the vessel was duly placed upon dry dock, her tail shaft drawn, a new wheel fitted and her bottom cleaned and painted. While on the dock, it was discovered that her rudder gudgeons were in need of repair, and this work detained her beyond the time originally anticipated by the libelant. She was finally redelivered to the owners on September 23rd, 1909, and sailed September 25th on one of her accustomed voyages to Honolulu.

Before the repair work on the "Hilonian" was undertaken, Klitgaard had sent in his resignation as chief engineer, to take effect after the completion of the work, and prior to the work's completion Capt. Saunders, on the authority of Capt. Matson and while the latter was in the East, designated Putzar as Klitgaard's successor. Putzar, therefore, was in charge when the vessel sailed for Honolulu and, after remaining her chief engineer for several voyages, resigned.

The date of the receipt by respondent of libelant's bill seems not to be clear, but at any rate, some time

in December, 1909, while Capt. Matson was again in the East, libelant's chief clerk, R. W. Curtis, called at respondent's office for money and was given a check for some $20,000, which included the contract price of the specification work, as well as some of the minor charges. This was a voucher check acknowledging "receipt in full" and, upon its being taken by Curtis to respondent, was returned the same day by its president, Mr. Eva.

The claim of libelant entirely ignores the contract of August 2nd, and Schedule 1 of the libel is admittedly a charge compounded of specification work, extra work, substituted work and, as respondent contends and will show, of work embraced in contracts covered by other schedules of the libel as well as work covered by contracts made and paid for long prior to the institution of this suit.

At some time subsequent to the rendition of the bill, respondent demanded of libelant a segregation of it and, although a compliance with the request was seemingly undertaken, it was eventually abandoned and nothing ever came of it. Thereafter suit was brought. Respondent then undertook itself the work of segregating libelant's bill and, with the aid of competent engineers employed for the purpose, assisted by Klitgaard and the assistant engineer of the ship, E. S. Kinsman, who was actively in charge of the engine room during the repairs, arrived at the reasonable value of the work done, and tendered this amount to libelant before filing its answer. This tender was rejected.

Libelant's total claim is for $34,737.72, while respondent's tender was for $22,922.56, both figures including the admitted contracts of Schedules 2 to 10 (respondent's with minor exceptions). The figure of libelant's tender was arrived at by deducting from the original contract of $11,749.00 the amount saved by not removing the crank shaft, deducting from Schedules 2 to 10 a few minor charges which it is claimed are improperly made, and to the sum of these two balances adding the amount of the extra work, which admittedly was not covered by any agreement.

The method adopted by counsel of proving libelant's claim as regards Schedule 1 consists generally of the introduction of hundreds (if not indeed thousands, we have not counted them) of labor time cards and material slips purporting to be records of time and material used in the work. These labor records are vouched for by present and past employees of the libelant who performed *shop* work on the "Hilonian" as distinguished from work performed on the ship itself. In proof of the labor performed on the ship, libelant introduces the "*time sheets*" of the time keeper, Putzar, which purport to contain a record of this time. (Putzar did not pretend to keep any other than ship time, although he was employed to keep time on the whole job.)

Respondent's proof consists of the evidence of experts, who spent many days in actual inspection of the work done, except in cases where it could not be seen and, in those cases, having it described and explained to them by both Klitgaard and Kinsman. Respondent also offers the estimate of Chief Engineer Klitgaard

(who was present during all the work) as to the value of the work done under Schedule 1. The experts using the rate of wage for labor as well as the pound price of material found on libelant's bill as the basis of their estimate, and adopting libelant's original figures on the specification work as the reasonable value of that work.

The issue, as seen by the foregoing, is clear cut. Libelant makes disclaimer of any contract having been entered into and stands or falls upon its quantum meruit charge. Respondent claims a contract was entered into which, though departed from in some particulars, must still be used as the measure of value for the specification work which was done. We venture the assertion that had the libelant, in sending its final bill, recognized, as it should have done, the contract of August 2nd, and pursued the course of making a deduction from it for the non-removal of the crank shaft, adding to the result its quantum meruit value of the extras, there would not have been this litigation resulting in the unpleasant task of revealing to the court matters connected with libelant's charge which are not to be commended.

In contesting the libel respondent's claim may be stated generally as follows:

(a) It contends that there was a contract, and that it must be used as the measure of value for the work which was actually done under it.

(b) That the irregularities of libelant's quantum meruit proof makes it impossible for this court to accept the value claimed for this work by libelant.

In this brief we will reverse the order of these contentions for the reason that the first (a) will be more clearly understood after the second (b) has been placed before the court.

Irregularities of Libelant's Quantum Meruit Proof.

The record is so voluminous and replete with minute detail that it will be necessary to make this argument somewhat extended, but it will be our purpose to make it clear and as easy of analysis for the court as the circumstances permit. The matter will be handled under the following general heads with appropriate subdivisions:

Proof of shop work:

1. Time card job numbers.
2. Libelant's time keeping system.
3. Verification of shop time cards by Adamson.
4. Re-identification of Adamson's work by 15 of the workmen.
5. Irregular shop time card charges:
   (a) The allowance of 9 hours for shop work when but 8½ hours of work were actually performed.
   (b) Overtime.
   (c) Miscellaneous irregularities.
6. The material cards.

Proof of Ship Work:

PUTZAR'S TIME SHEETS.

I. The relations existing between Putzar and both parties.

II. Our contention that Putzar did not keep an independent record of the time.

III. Irregularities of Putzar's time sheets.

IV. Allowance of overtime before straight time has been worked.

V. An allowance of 10 hours when but 8½ hours were worked.

Proof of Shop Work.

(1) TIME CARD. JOB NUMBERS.

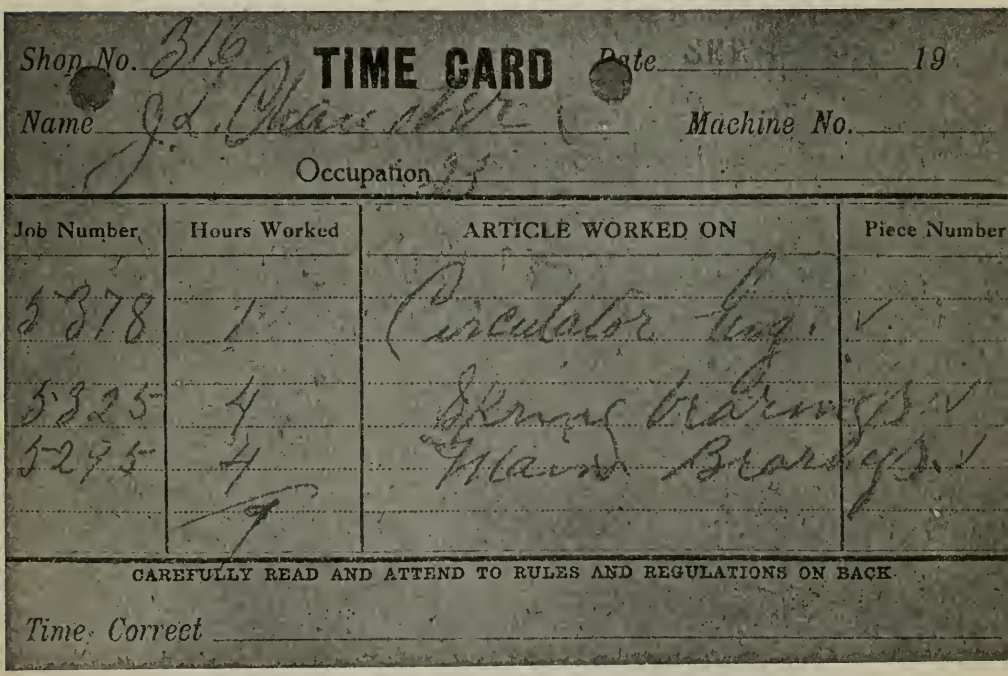
When a job comes to libelant's shop, whether it be a contract or time and material work, it is given a "job number", and these job numbers are placed on the jobs consecutively as they come in and are retained throughout all departments of the shop until the job is completed (I, 281; III, 1016). Just where these job numbers originate is hard to tell. Mr. Christy, who is the general manager of the libelant, says they originate with him in the ship yard across the bay (IV, 1272-1273). Curtis, who says he is the chief clerk, says they originate with him (IV, 1427), while two of the witnesses say they originate with the time keeper (Dolan, I, 153; Ferro, IV, 1310). Each job is given a number for the purpose of keeping track of the work

and, if there is a change made in the original list of work, then such change is worked under a new job number (Wilhelmson, III, 1017). After the original list of work is given its appropriate job number, the foreman of the several departments where the work is to be done are furnished with copies of the list of work impressed with the job number (IV, 1427, 1428). When a workman in a particular department of the shop is called upon to do any of this work he is told or furnished with the job number under which the work is to be performed, and by him this job number is transferred to his personal "time card". He also places upon this time card a brief description of the work he does under each particular job number. He does not necessarily know for what ship the work is done and, aside from the brief description of the article worked on or the kind of work done and the job number, the only other matter placed on the card is the number of hours worked on each job number, the workman's individual shop number and his signature. These time cards for shop work are the fountain head from which the labor charges of libelant are drawn, the records from which its bills are compiled, and they form, therefore, by far the most important of its items of proof.

In this case these cards were produced by the hundreds and offered in evidence over the objection of respondent. On their face they purport to set forth the *actual time* consumed in the doing of work and, if admissible as evidence at all to bind the respondent, this should be and, we submit is, the limit of their function. If as matter of fact they do not set forth

the actual time consumed by the workmen, then we know of no principle of law that would make them evidence against the respondent. But this particular feature of the matter we will discuss at a later time.

The great majority of these time cards are impressed with more than one job number, sometimes four or five, representing work on different ships, and we herewith reproduce one that the court may have a general impression of their character:



Shop No. 316 **TIME CARD** Date SEP 19

Name J. Chandler Machine No.

Occupation J

Job Number	Hours Worked	ARTICLE WORKED ON	Piece Number
5378	1	Circulator Eng.	V
5325	4	Steering Gear	V
5275	4	Main Bearings	V
	9		

CAREFULLY READ AND ATTEND TO RULES AND REGULATIONS ON BACK

Time Correct

(Adamson's Exhibit 52.)

At the close of the day's work or, to be more accurate (for great numbers of the cards show "overtime" work), at the time he stops work on each day, or perhaps the next morning, the card, having been made up

and signed, is passed by the workman into the libelant's office to a so-called "time keeper".

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(2) LIBELANT'S TIME KEEPING SYSTEM.

The record is replete with testimony of the workmen referring to a time keeper, whose name was Sjoberg (IV, 1283). He is said to have checked up the time cards after they reached the office, to have checked up the men's time (Mockel, III, 808). He made all changes or corrections to be found on the cards in red ink (Adamson, I, 199; Allen, II, 516). He rectified mistakes made in job numbers (II, 507, 562); in fact, the foreman of one department, as we have pointed out, said he gave jobs their job numbers (Dolan, I, 153). Another witness said he took the "time" from the cards and entered it on the books (Cronin, II, 696); another, that he added to the cards the overtime allowed the men (Adamson, I, 203; Roberts, III, 717). He rectified the mistakes made by the workmen in setting down their time (Cronin, II, 698, 701, 702). From the record it is perfectly clear that Sjoberg would have been a most important witness in the matter of verifying the accuracy of these cards, yet he was not called to testify, although still in the employ of the libelant at the time of the hearing (Dolan, I, 154). No reason appearing for not calling him, we will be permitted to surmise that Sjoberg knew things in connection with this case that would have damaged libelant in the telling, more than would his testimony, with reference to a verification

of the accuracy of the time cards, have been a help. The fact that Chief Clerk Curtis (the man who was "assisting" counsel (I, 302) testified instead of Sjoberg is no excuse, for the testimony of the workmen was without exception addressed to the time keeper and not to Mr. Curtis, of whose testimony we shall have more to say later on. We repeat that Sjoberg should have been produced if counsel was sincere in his avowal that he intended to "remove all doubt as to the accuracy of this record" (III, 775).

From the fact that the evidence shows that libelant had a "time keeper" (IV, 1283), one would be led to the belief that his duties were such as would be some check on the workmen while they were at work; in short, that he "goes around to work and checks the men on the work, probably twice a day, takes down their numbers and the number of hours they are working on each particular job" (Diericx, I, 109). But under libelant's system it seems that the time keeper's duties had no concern with the records of the men as affecting the time to be charged to libelant's time and material *customers*.

Let us see how the system worked. Libelant's workmen were paid a given price per hour, and it was immaterial to either the workmen or the employer, in determining the number of hours worked in a day, how that work was distributed over the several job numbers worked on. The *aggregate* of the hours was the basis on which the wage was paid, and whether such aggregate was made up of four hours devoted to work on one job number, and three and two to other

respective job numbers, was immaterial; if the workmen's time cards showed an aggregate of nine hours' work he was paid on that basis. Therefore, the important fact to libelant was to establish the accuracy of the aggregate number of hours shown by the workmen's time cards. It may fairly be inferred from the fact that the time cards used in August and September, 1909, were an old form (see printed back of cards showing 10 hours establishing a day's work), bearing an appropriate place for a signature vouching for the correctness of the time, that such in former days was the method adopted to establish the accuracy of the aggregate time placed on the workmen's time cards. At the time of the "Hilonian" work, however, there was no rule in force requiring such signature in the place referred to. Instead, a much more accurate and satisfactory method of checking this aggregate time was in vogue, entirely obviating the necessity of the several foreman being burdened with the responsible duty of knowing when a workman commenced and finished his day's work, for there was installed in libelant's yard, at that time, a "time clock" which each man on entering or leaving the works was required to punch. This gave an absolute check *on the presence in the shop* of each workman and, as the only remaining matter to be covered was the question of how much of the aggregate time so recorded by the clock was expended in work—this correlative matter was left to the foreman of the respective departments and the time keeper. The foreman put and kept the man at work, that was obviously his duty, and the time keeper checked the aggregate

hours shown by the workman's time card with the time record shown by the time clock. If the comparison showed a difference in favor of the time card it was, of course, reduced to conform to the clock, for no man could expect to be paid for a greater number of hours worked than the clock showed him to be present in the shop (see Stimel, III, 822-827; Pennycott, III, 829, 837, 838; Boyer, III, 896, 902, 905). And so there was no further reason for the time to be vouched for by the signature of the workman's foreman. The cards, however, bearing the inference that such had been a former rule, were still used at the time of the "Hilonian's" work because they were on hand.

It will be seen, therefore, that the accuracy *of the segregation and apportionment* of the day's work *to each individual job number,* was left wholly to the workman. This particular detail was one affecting the pocketbook of the customer and not the libelant. Bills for time and material work, as in the case at bar, were compiled from this unchecked record of libelant's employee and, from the standpoint of *monetary interest,* it mattered not, in the selection of its workmen, whether they were competent or incompetent, careful or reckless, fast or slow, old or young, deaf, dumb or blind. It paid *all* their accurately determined and appropriate wage and were recouped by the customer for each hour's work so paid for, *with an added profit.* As a matter of fact, under this system, a slow and incompetent workman, on a time and material job, would be a more profitable employee than one who was expeditious, for the former would consume more time

in doing a particular piece of work and the profit to the libelant, being figured on each hour, why, the more hours the greater the profit. For instance, if the wage paid the workmen is 40¢ per hour while the rate charged the customer is 60¢, which, of course, included libelant's profit, then the more hours to charge the more profit to collect.

Under libelant's system there would seem to be no *monetary incentive* to guide it, either in the selection of the workmen or in the ascertainment of the actual work performed on a particular job number. In truth, from a *financial standpoint,* it would be unprofitable to accurately ascertain the time given by each workman to a particular job number for, beside the reason heretofore stated, there would be the cost of such ascertainment. It would require the services of a class of employees unknown to its pay roll, viz., time keepers, and time keepers in the true sense of the term for each department. In the case at bar libelant is unwilling, or at least deems it inappropriate, to accept the unverified statement of employees of its own selection as to the aggregate number of hours worked each day, but is insistent in maintaining it to be right that respondent accept such unverified statement with reference to the number of hours worked each day on the "Hilonian" job numbers. Libelant takes due precaution against possible errors of omission or commission on the part of its workmen as they may affect it, but when it comes to the protection of the customer against the same vice that is another matter.

Counsel may claim that as some of the work done in libelant's shop was contract work, and as the record shows that the men could not tell contract work from time and material work, therefore, in the doing of *both* classes, it was to the advantage of the libelant to see that efficient and expeditious service was rendered. Our answer is that, if it be to the advantage of the libelant, from a financial standpoint, to be indifferent as to one class of work and vigilant as to the other, then assuredly it would not be an unwise guess to predict the course that would probably be followed. It may be the rule of the shop to refrain from informing the workmen that a certain job number represents contract work, but it would be stretching one's credulity to say that such information was not imparted to the foremen on the work. We have in mind that assistant foreman Adamson in some cases had that "detail" (I, 190).

Counsel may also say the cards in this case have been supervised, and the time worked on each job number checked and found to be correct by the foreman of each department. It is true that in the pattern maker's department Francis Dolan, the foreman, identified his own cards and those of three of his workmen *that he had signed at the time* (I, 125, 126, 128); that in the blacksmith department George Allen identified his own cards and those of seven of his men (II, 506-508-511-518-523-530-538); that Edward Corcoran, a machinist, identified his own cards and those of a workman, since dead, and one other (II, 570; III, 1065); that F. Paoli, a boy 16 years of age in 1909, identified his own and

the cards of "his helper" at the time (II, 682); that C. Grotefend, a workman, did the same for himself and five other fellow workmen (III, 961, 962); that Wm. MacDonald, a draughtsman, did the same for himself and two fellow draughtsmen (III, 970, 971), and that *Robert Adamson,* assistant foreman in 1909 of the machine shop, identified his own and the cards of *73* of his fellow workmen (I, 198 to 396). But what of it? Is this a proper method of proving reasonable value of work? These are the employees of libelant, whom libelant does not find it good business to trust when it comes to taking their word for the amount of the daily or weekly wage to be received, so it uses a time clock. Is it equitable that respondent should submit to a system which libelant fears? It may be that libelant has *paid more* to have the work done than it was reasonably worth, but should respondent be made to suffer on that account? Furthermore, the contention that one man, whose duties were as varied and numerous as were those of Robert Adamson, did or could in addition to the performance of such duties keep a check on the time of a score or more of other workmen, so as to be able at the end of the day to tell the number of hours or half hours each of them had worked on a score or more of different job numbers involving various kinds of work, is simply preposterous, and counsel must have had some glimmering of this situation, for, after Adamson had been asked to vouch for the correctness of the time shown on the hundreds of cards belonging to these 73 men, *and had fully done so,* he proceeds to put on the stand some of the men to re-verify their own

cards. Counsel's explanation for commencing this re-identification evidence was:

> "* * * You seem to have some doubts about some of Adamson's cards. I am going to remove all doubts as to the accuracy of this record. I do not want any question left open as to the accuracy of these cards."
>
> (III, 775.)

The "doubt" referred to extended to not only "some" but *all* of the cards identified by this man.

As counsel was making proof in this case for the court to pass on, and not the attorney for the respondent, it is but proper to assume that the real reason for calling the workmen themselves to vouch for the correctness of cards which had already received treatment from Adamson, was not because of a doubt existing in our mind but in the mind of counsel himself. This attempted method of settling the question as to the accuracy of Adamson's work partakes of an admitted implication that the court itself might be impressed with the same doubt after reading the witness' evidence, if it was to be left unsupported. Counsel's fear did not stop, however, with the calling of some of the workmen but, before closing his case, he had Curtis, the "chief clerk", testify to his having made diligent but futile search for nine of Adamson's 73 workmen (Doig, Jr., Wm. Schmidt, C. W. Higgins, Dunn, Furman, Holmquist, Reed, Williams and M. W. Albers, IV, 1441-1454). This makes it perfectly apparent that counsel's fear of "accuracy" was real and extended to every one of the cards of the 73 men identified by Adamson, for his

identification of each was practically the same. However, as there were but 15 men called who gave personal support to Adamson, we submit that there remained the time cards of 58 workmen resting solely upon the unsupported testimony of Adamson as to their accuracy with respect to the time expended in labor on the "Hilonian's" job numbers. This situation, of course, necessitates a somewhat extended analysis, and we, therefore, now pass to that subject.

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(3) VERIFICATION OF SHOP TIME CARDS BY ADAMSON.

A time card inscribed by one of the workmen of the libelant, showing a certain number of hours worked on a particular "Hilonian" job number, is, of course, a self serving document and can not of itself be used as evidence against the respondent to establish the fact recorded. In the absence of an independent recollection on the part of the workman himself, it could be used to assist his memory and, as we understand the law, its sole function and use would be a memory assistant. We believe it further to be well settled that such a document might be used by another, other than the inscriber, as a memory assistant, provided the witness had a memory of the fact inscribed, that is, had personal knowledge, at the time, of the happening of the fact.

Therefore, although not the inscriber of these cards himself, Adamson could make use of them if, in so doing, they enabled him to speak with verity of the

matter which they record. In short the testimony must be directed to the fact and not to the card.

The initial examination of Adamson on the time cards started with the cards of C. Schmidt. After identifying the card as belonging to the man *whose name appeared on it,* the following ensued:

> Q. State whether or not you kept this man's time and checked it up.
>
> A. Yes, sir.
>
> Q. On this card?
>
> A Yes, sir, you will find my check on all these cards. You will find my check against every item down, checked every day.
>
> Q. That is you took and saw that the card was right with respect to the man, the number of the job, the hours of the work and the articles worked on, is that right?
>
> * * * * * * *
>
> A. That is right.
>
> (I, 198, 199.)

Again:

> A. They were all checked off at the time and I guarantee they are according to the time that he worked, and the jobs that he was working on. They were all checked off by me at the time.
>
> Q. You knew them to be correct at the time that the entries were made?
>
> A. Yes, sir.
>
> * * * * * * *
>
> A. * * * They were all checked off and found correct when they were checked off.
>
> (I, 200.)

And again:

> Q. Now, I hand you a batch of cards bearing date, *September 12,* 13, 17, 18 and *19,* with the

name of John Benson. Just examine these cards and tell us whether or not they are the cards of a man working on that job on the "Hilonian" at the time there mentioned and whether or not the number of hours, the numbers of the jobs and the nature of the work are truly entered there?

A. The number of the jobs, and the time given on the number is all right.

(I, 201.)

The foregoing will give the court a fair average of the witness' testimony concerning all the cards. The questions put were all of the same general phraseology.

In the beginning of his examination he rejected a card bearing date of *September 12th,* claiming it did not pass through his hands, that it was a Sunday or holiday, and he would not "guarantee" it (I, 205), and when asked by opposing counsel how he was able to identify the card as one not checked up by him he replied: "There is no check mark on it" (I, 206). On the opening of his cross-examination relative to the time cards we find the following:

Q. Mr. Adamson, I noticed that as you gave your answers relative to the time cards which have been introduced in evidence here as exhibits from 1 to 103, that in each case you gave careful examination to each card that was handed to you before giving an answer; will you tell me why you gave this particular examination to each card before answering the question?

A. I wanted to find out and prove that the cards were as I had checked them off when they were before me, and before they were handed into the office, and they had not been altered in any way.

* * * * * * *

Q. What was it on the card that gave you information that would enable you to answer right?

A. My check mark on each card.
Q. Anything else?
A. No, sir.

(I, 257.)

And again:

Q. If it were not for the check mark you would have no recollection of the job number and the time contained on the card?

A. I don't claim to have a memory to carry me back two or three years to special numbers, when there are thousands of numbers run, that there was any special number at that time.

Q. Will you please answer my question?

* * * * * * *

A. Not at that time, not two years back.
Q. You mean not at this time?
A. Not at this time.

Q. So it is the check mark alone that enables you to identify these cards?

A. Yes, sir.

Q. You have not seen these cards before this, since they were turned in by you two years ago, have you?

A. No, sir.

(I, 260, 261.)

And again:

Q. I understand you have made no check mark on these cards since they have been brought into the room?

A. No, sir.

Q. These check marks were made at the time the card was turned into the office?

A. That is so.

Q. And you have not seen the cards since then?

A. Never since, until they were in this office before me here.

Q. You could identify in the same way any of the cards that would have your check mark on them, if brought in here, could you not?

A. Yes, sir.

Q. Mr. Adamson, in testifying yesterday and in making your examination of these different cards, I understood from you this morning, that the examination was for the purpose of discovering your check mark. Is that correct?

A. Yes, sir; that I can prove that these were the checks marked off by me at the time.

Q. You were simply examining them for the purpose of discovering your check marks?

A. That is what I was examining them for.

Q. And that is all you looked for?

A. That is all I looked for.

Q. And nothing else?

A. Nothing else.

(I, 263, 264.)

In a recross examination of the witness we find the following:

Q. * * * Do you mean to say that a card coming into your hands with four different numbers on it, and four different kinds of work performed under each number, that you would check some and not all as being your approval of that card?

A. I checked all the time-cards that were marked down.

Q. That is, it was your purpose to check each of the numbers?

A. Yes, sir.

Q. And the work done under each number?

A. Yes, sir.

Q. Now, suppose we find cards where some of the work is checked and others left unchecked; what does that mean?

A. That does not necessarily mean that I did not check these off. It was really a matter of my own convenience whether I put a mark on or not.

I was not asked to do so, it was not compulsory to do so. It was just as I felt myself, whether I would put a check mark on them.

Q. Now, we come to a situation, Mr. Adamson, where your check marks have bceome important, for they alone refresh your memory as to the correctness of the cards. Now, you mean to say that that being the fact, you are enabled to have your mind refreshed where there are no check marks on the cards simply because one item on the card has a check mark and the others have not. Does the one check mark opposite one piece of work refresh your memory as to the other piece of work on the same card where there are no check marks?

(II, 409, 410.)

Counsel here raises some objection to the question and asks that it be divided. The question is read to the witness and this follows:

Q. Do you understand the question, Mr. Adamson?

A. I will answer one question, if it is one question. If there was one check mark found on that card it is a check for the whole card as it stands there.

Q. Even though that check mark stands opposite, and distinctly opposite one piece of work?

A. No matter where it stands on the card.

(II, 411.)

Counsel here asks the reporter to read the question over to the witness to see whether he assents to the "proposition" stated in the first part of it. The reporter reads:

"Q. Now we come to a situation, Mr. Adamson, where your check marks have become important, for they alone refresh your memory as to the correctness of the cards."

Mr. FRANK. Now, stop right there.

The WITNESS. I will answer.

Mr. MCCLANAHAN. Q. What have you got to say to that?

A. It does not necessarily require these check marks to refresh my memory whether I checked off every item noted on that card.

(II, 412.)

Counsel then enters an objection.

Mr. FRANK. I object to the entire question upon the ground that it is not a question of refreshing memory at all but it is a question of the regular course of his business whether or not he passed on those cards whether checked or not checked at the time that they were handed him as he knew them then to be correct.

(II, 412, 413.)

His former check mark testimony is then read to the witness and he attempts to confine his evidence as intended to refer solely to the card on which the check mark appeared:

A. I say it identifies that card which was put before me with a check mark on it.

Q. If it did not have a check mark you could not identify the card?

A. I did not say that I don't think; at least I did not mean that I could not identify any card.

Q. Let us go into this a little. I show you, Mr. Adamson, the time-card of D. Stimmel for *September 12th,* 1909, which is a part of "Exhibit Adamson No. 8," and ask you what is there on that card that enables you to testify that the job number is correct, that the work performed on the job number is correct, and that the hours consumed in that work is correct?

Mr. FRANK. He did not so testify.

Mr. McClanahan. The witness can correct me if I have made a mistake. That is my clear understanding of his testimony.

Mr. Frank. His testimony was, at the time it was passed in he then knew it to be correct, but he has no present recollection of it yet.

A. That is my answer yet. I have no present recollection of a number running in the shop at that time, but that that card was marked by me as being correct.

Mr. McClanahan. Q. You have no present recollection. What is there on the card which enables you to say at the time that card was passed in it was correct?

A. The date of the card.

Q. Anything else?

A. And the man's name.

Q. The fact that D. Stimmel was working in your shop at that time?

A. Yes, sir.

Q. Anything else?

A. I cannot recall anything else at the present time. It is too far back.

Q. Let me ask you, further, if your check mark appeared on this Stimmel card on September 12th it would aid your memory, would it not?

Mr. Frank. He has not said that.

A. Not necessarily.

Mr. McClanahan. Q. Answer me whether it would or not.

A. No matter whether it was on or not it was passed by me at that time. That man was working there, and I passed it as being correct.

Q. How do you know it was passed by you?

A. All the shop cards were passed through my hands.

Q. You have not seen this card since it passed through your hands, if it ever did?

A. I know it passed through my hands at that time with the others on the same date. All the shop cards for that date passed through my hands.

Q. With reference to this card of September 12th of Stimmel, are you not testifying to its verity simply because it has been introduced by the United Engineering Works as one of their time-cards. Is that not your sole reason for testifying it is there?

A. My reason is that that man was working there at that time. I got his time-card for that day to pass on, and passed on it as being correct.

Q. You have no recollection of getting it, have you?

A. The time-card is there before me, and that is the card that I would verify as being his time-card for that date.

Q. But you have no recollection of the card itself, have you?

A. I cannot recall what was passing before me to a certain point at that date. It is too far back, two years ago.

Q. That is what I thought.

A. I could not recall the running numbers at that time.

Q. I call your attention to a card of John Wodjacki, of date September 21st, being a part of "Adamson Exhibit No. 7," and ask you, what is there on that card that refreshes your memory as to its verity at this time?

Mr. Frank. I have the same objection to make. There is no such testimony as to its verity. His testimony is that at the time the card was made out he then knew it to be correct and passed it into the office.

A. Yes, sir, and I make the same statement now.

Mr. McClanahan. I will take Mr. Frank's interpretation of the situation and ask you what enables you now to say from an inspection of that card, that you knew at the time it passed through the office that it was correct?

A. Because that man was working in there and there is the date on the card, and I knew that man was working in the shop at that time. I make

the same statement as regards the other cards, that his card was passed by me at the time and was found correct.

Q. You recognize now that that card has no check mark of yours on it?

A. That is nothing to me.

Q. Answer the question.

Mr. FRANK. That is what he says, "that is nothing to me."

A. It is of no consequence to me at all in reference to my having checked the card or not.

Mr. MCCLANAHAN. Q. I understand that. We will get along faster if you answer my question simply, and then make your explanation if you want to. You recognize there is no check mark of yours on it?

A. There is no check mark of mine as far as I can see.

Mr. FRANK. You are wasting a great deal of time. It will come to naught. You may think it will come to something but it will not.

Mr. MCCLANAHAN. Let me go on in my ignorance.

Mr. FRANK. I will, but it will be expensive in the end.

(II, 416, 417, 418, 419.)

He is examined on the cards of other men not having a check mark, and is asked what there is on the cards that enables him to speak for their verity in the particulars he had testified to. His replies follow:

A. Nothing more than that I testified that that was properly checked off as regards the number and time and everything on it at the time it was made out.

(Benson's Card, II, 422.)

A. I know that man was working there at that time. I know by his handwriting, that he has written out that card himself.

Q. Anything else?
A. And the date of it, and I guarantee it was passed before me.

(McDonald's Card, II, 423.)

A. The date of the card and the man's name.
Q. Is there anything else?
A. No other marks that makes me recognize it any more other than the man's name and the date of it, and he was working there at that time.

(Martioli's Card, II, 425.)

A. There is on that card this insertion in red ink which would be made by my instructions by the time-keeper.

(Another of Martioli's Cards, II, 428.)

A. I know that that man was working there at that time as a machinist, and that his time-card was checked off by me as being correct at the time.

(Bouick's Card, II, 434.)

A. He was a machinist working with us at that time, and that is marked there as his card, and I checked off that card at the time as being correct.

(Furman's Card, II, 434.)

A. Any more than that that man was working in my department at that time, and that his card was made out for that and I passed that card in as being correct at the time.

(Acosta's Card, II, 441.)

A. There is the name and the date and the handwriting of the man who wrote out the card, whose card is represented to be there.

(Kassner's Card, II, 444.)

A. I make the same statement that I made in regard to the others, identifying that card as being the card of John Williams on that date.

(Williams' Card, II, 445.)

A. I make the same answer with the addition that I knew that that man was working on the work at that time.

(Blake's Card, II, 446.)

A. My answer is that I verify that card by knowing the man's handwriting personally, and knowing that the man was working there, and knowing that his signature was put to the pay-roll at that date.

(McConky's Card, II, 447.)

A. Well, the man's name is there and he was working there at that time for the firm, and I checked off his card at that time that it was handed in to me.

(McConky's Card, II, 449.)

A. I make the same answer to that as I made to some of the former cards, that I knew the man was there on that date and I passed on his card and found it correct at the time.

(Boehle's Card, II, 456.)

A. I recognize it by that man's handwriting, that that is written by himself, and the date on the card, and likewise as I see, a check mark on the card.

(Strowenjan's Card, II, 458.)

A. The name and the date makes me recognize the card in connection with the man personally.

(Albers' Card, II, 459.)

A. I would say that the handwriting on the card would make me verify that card.

Q. You recognize there is no check mark of yours there?

A. I take so little interest in that check mark in verifying the card, that you must excuse me if I do not answer that every time. No, I see no check mark.

(Materne's Card, II, 460.)

Q. I have examined you, Mr. Adamson, on various card numbers that are to be found in exhibits from 1 to 47 which have been introduced on your direct examination—I have not been able to examine the other exhibits yet between 47 and 103, but if there be in those exhibits cards that have not your check mark on them, I suppose that your explanation of your ability to properly verify those cards at that time would be the same as it is to the cards which you have been examined on—where your check mark does not appear?

A. If I remember, my former remark to that was that I can verify them because I know all shop cards passed through my hands before they went to the office, whether they have my check mark on them or not.

Q. Then your answer would be the same practically?

A. Yes.

(II, 433.)

We confidently submit that this testimony shows conclusively, if there was nothing more, that Adamson's inspection of these hundreds of time cards refreshed his memory *solely* as to matters of little or no materiality to this suit, and did not by one iota assist in recalling to his memory the fact of a workman having performed a certain number of hours of work

on the "Hilonian" on the day inscribed on the card. Yet these are the sole facts material to the case and, without legal proof of them, it becomes immaterial that certain named men worked on the "Hilonian" on the given dates, for it is admitted that men worked on the "Hilonian" at the time. Counsel contends that Adamson checked or examined these cards at the time they were said to have been given him, and at that time found them correct, and at this time is simply testifying that these are the cards he then examined. Of course, the *examination* or *checking,* which may be thus referred to by counsel, must be of such a nature as to include personal knowledge by the witness that the inscribed matter on the cards was correct. In other words, the contention must be made that Adamson knew the time worked by each of these 73 men on each of the several job numbers at that time being worked on in the shop of the libelant, and, *at the time,* compared such personal knowledge with the written record of the men and found the record in harmony with his knowledge. We say this *must* be counsel's contention, for anything short of this would make Adamson's testimony ineffective as legal proof. If this proposition is not stated with substantial accuracy, we will await counsel's criticism of it.

Assuming, however, that our statement of the knowledge which Adamson must have possessed in order to make his testimony material, is correct as a matter of law, we are next led to the inquiry whether, under the circumstances of this case, it was possible for Adamson to have had such knowledge. He was not

a timekeeper for, had he been, he would have been so designated and would have kept *an independent record* of the time of these men. There is no pretense of there having been any other timekeeper at the works of the libelant than Sjoberg.

The record shows that in 1909 Adamson's duties as assistant foreman were varied. He says:

> A. My duty at that time was to receive the pieces as they came from the ship and find the proper number to place on each piece from the office, and keep a check upon it, and the time taken while it was in the shop.
>
> (II, 399.)

He had to apportion the work to the men under the direction of the foreman (II, 400); he assisted the foreman in seeing that the work was properly performed (II, 400).

> A. My other duties were to lay off any portion of the work which required to be machined in a certain way, or worked upon in a certain way; if it wanted lines on it, to make it accurate, to show how the man was to work accurately on the work, it was my duty to put the lines on it, and do any necessary markings on it before it left my table.
>
> (II, 400.)

It was also his duty to paint the proper job number on each piece before it left his table (II, 341). It will be noted that when the piece was ready for the workman Adamson drew the foreman's attention to it and, if the foreman could not take the work to the man, Adamson did it for him (II, 341). He gave orders to the foreman of the tool shop for the making of

special tools (II, 403); he had charge of issuing orders on the store room for material that went into the job from there, and "superintended" its use on the job (I, 191, 192), and finally he weighed personally all the material which came from the shop (I, 194, 195). These were duties not alone performed with reference to "Hilonian" work, but pertained to all other ships and jobs then being worked on.

So far we have made no special reference to the method which Adamson says he used in keeping time or, to be more precise, the manner in and by which he gained this personal knowledge of the time of other men. It is first explained on his direct examination:

> Q. What do you do with respect to the time or noting the time that the man at the machine takes the job and the time when he finishes it?
>
> A. I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes.
>
> (I, 191.)

There is no suggestion in the record that the "note" made by the witness was anything more than a mental process, and we will assume that that was what is meant, for had it been otherwise counsel would certainly have brought it out (Adamson kept no time book, I, 285). The process, therefore, by which the witness acquired personal knowledge of the time was solely a mental one, in that he was called upon to remember the hour each man received from him the work to be performed under each particular job number and, upon the cessation by the workman of the

work on such job, the witness would be called upon to recall the hour the work had been commenced and then note the hour of its completion. This process gave him knowledge of the time consumed in the work. Having thus acquired personal knowledge of this fact by a memory test, he must mentally *retain* the acquired knowledge until the day's work is completed and until he can receive into his hands the record kept by the man himself in the form of a time card, which the witness would then proceed to check up with his memory, the checking of Saturday's work being deferred until the following Monday (I, 205). The whole process, therefore, is a memory test and, while it would not be remarkable to find men having the varied duties to perform which this man had, successfully undertaking, in addition to those duties, the task of checking up in this way one or two or perhaps three items of time worked on separate items of work; we submit that to pass much beyond the number named leads one into the realm of things phenomenal. The contention that this witness could apply his memory to the task of keeping the time of a score or more of men, each working during each day upon from two to five or six separate job numbers, so as to acquire from each man through the succeeding hours of the day variable periods of commencing time applicable to different job numbers, and retain these periods in his memory, and recall and apply them again at variable periods to their respective job numbers, and finally retain the resulting facts so as to be able to apply them in a test of the accuracy of the record made

by the workmen themselves, is preposterously absurd. Yet this is precisely what the court is asked to believe, and Adamson's mental test method is the sole proof of the time of 58 of the workmen doing shop work on the "Hilonian."

Wilson, a machinist, who was afterwards called to vouch for his own cards that Adamson had previously vouched for, clearly shows the difficulty one would have in looking after the time of his own card, *if he did not make record note of the time spent on each number as he went along.* He says, with reference to his card of September 6th:

> A. At the end of that hour I put down what I did, and the number of the hours on the job, when the job is finished—each job. On some days there is more work than others and I could not carry it if I did not place it on the card.
>
> (III, 778.)
>
> (See also Id, 779.)

When one knows the caliber of Adamson's mind the proposition becomes even more impossible of belief. For instance: Adamson cannot recall ever having seen before the specification work for the "Hilonian" (I, 250-253); he cannot recall one single number of the eighteen job numbers that were identified with the "Hilonian" work, I, 263; II, 351, 374, 406); he cannot recall any special piece of work done by him at the surface table during that period (II, 470); he does not remember what foreman or machinists or helpers or apprentices in the machine shop were paid at that time (I, 274-275); he cannot remember the names or

the number of men working under him at that time (I, 426); he cannot tell the name of any other vessel that was at the shop when the "Hilonian" work was being done, nor the date the "Hilonian" was there (I, 304), or the month or day of the month she arrived there (II, 463); he cannot remember the time of starting work in August and September, 1909 (I, 273); he does not remember his own rate of wage at that time (I, 276); he cannot tell now whether he was in attendance during the whole period of the "Hilonian" work (III, 463); he cannot recall "specifically" anything done at that time on the "Hilonian" (I, 285-286; II, 464); he does not remember that the tug "Ranger" was at the works when the "Hilonian" was there (I, 297-304; II, 499, 500); he cannot tell the character of tool room work charged to the "Hilonian" and checked by him (II, 308); he cannot tell what the trolley rail work was which he himself did for the "Hilonian" (II, 315-316); he cannot remember any special tool made for the "Hilonian" while she was in the yard (II, 403), nor can he recall whether he worked at that time on Sundays (II, 424-425).

Adamson's mental process of vouching for the accuracy of the time cards introduced, of course, necessitated *his presence in the shop during the time worked.* The witness himself recognizes this as we shall presently show, and we submit that under such a condition, had he the mind trained for the purpose, it would show a most remarkable feat of memory if he was able to do what was claimed for him, and Adamson's memory

was far from being remarkable except for its deficiency.

The Sundays which intervened while the "Hilonian" work was being done were August 29th, September 5th, 12th and 19th. Adamson did not work on Sundays. In the early part of his direct examination we find this interesting piece of testimony:

Mr. Frank. Q. Now, I have here another batch of cards of P. Mockel, dated September 12th, 13th, 14th, 15th, 17th, 20th and 21st, and ask you to examine them and indicate whether or not they were made and checked up and handled by you in the same manner as the other cards already testified to?

A. There is one card there which I have not checked off. He worked on a Sunday when I was not there to check it up. All the others I can vouch for.

Q. Which card is that?

A. That first card.

Q. September 12th?

A. This one here (pointing). He either worked on a Sunday or a holiday. I do not know what date that came in, but I was not there to check it off.

Q. Did it pass through your hands at all?

A. No, sir, that has never passed through my hands; at least if it did I did not check it because I could not guarantee that he had been there and I would not check it. Probably I did not get the card and may not have been there that day. Probably I went over it, but that is one that I would not guarantee, and it is the only one.

Q. It could not get to the office except through your hands, could it?

A. I beg pardon.

Q. It would not go to the office except through your hands?

A. It would go to the office if it was work on a Sunday. It would be collected on Sunday night

> and put in the office. It would be the Saturday cards that I would check off, or Saturday night cards that I would check off Monday morning the first thing.
>
> (I, 204-205.)

The fact that the witness did no Sunday work at that time is further made conclusive by the failure of the record to show a single card of his own bearing a Sunday date (Adamson's Exhibits 99, 100, 101). This card of Mockel's, bearing date *September 12th,* is clearly and emphatically eliminated from Adamson's supervision and checking because it bears the impress of work done at a time when Adamson could not possibly have supervised it. What must be thought then of this man when we point out to the court that thereafter, in the course of his further examination, the September 12th cards of 17 workmen were presented to him by counsel, and their accuracy as to the hours worked, and everything else, glibly O. K.'d? (Benson, I, 201; Stimmel, I, 208; Boyer, I, 212; Strowenjans, I, 215; Martioli, I, 218; MacDonald, I, 223; Kasener, I, 224; Wilson, I, 225; Larrando, I, 227; Pennycott, I, 229; Thomas, I, 233; Gus Albers, I, 234; David Doig, Jr., I, 235; Turner, I, 245; Furman, I, 383; Williams, I, 389; M. W. Albers, I, 395).

Not only this but he identified the cards of Sunday, August 29th, of Boyer (I, 213), Strowenjans (I, 216), Hay (I, 221), Doig, Jr. (I, 235), Schmidt (I, 244), and the cards of Sunday, September 5th, of Boyer (I, 213), Strowenjans (I, 216), Hay (I, 221), Kasener (I, 224), Wojdacki (I, 226), Schafer (I, 227), Chandler (I, 232),

Thomas (I, 232), Young (I, 234), Schmidt (I, 244), Furman (II, 377), Holmquist (II, 380), Reed (II, 386), Williams (II, 390); and the cards of Sunday, September 19th, of Benson (I, 201), Boyer (I, 212), Martioli (I, 218), Mello (I, 230), Chandler (I, 232), Thomas (I, 233), Schmidt (I, 245), Turner (I, 245), Bouick (II, 375) and Williams (II, 389). These cards constituted the Sunday work done by all the men in his department during the time of the repairs.

But this is not the end of our criticism of the "accuracy" of these shop time cards or of Mr. Adamson, the sponsor for them. Not only was Adamson absent from this work during the four Sundays just referred to, but at the time of the hearing *it appeared* he had also been absent from the work on August 25th and 26th and September 6th, 7th and 18th. Having noticed in his direct examination (I, 246-247) that the witness only identified his personal cards of August 24th, 27th, 28th, 30th, 31st and September 1st, 2nd, 3rd, 4th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 20th and 21st, while his verification and identification of the cards of other workmen had extended throughout the entire period, we called upon counsel *on two occasions* to produce Adamson's missing cards (II, 464-470) but they were not forthcoming. To secure all the light possible on this subject of the witness' presence during the progress of the work he was asked:

> Q. While it was in the shop were you in attendance during the whole period that the work was being done in the months of August and September? That is, were you there each day?

A. That is more than I can remember now, it is so far back. I cannot remember every little detail, whether I was there each day or night.

Q. Would your time-cards show whether you were there or not?

A. Probably they would.

(II, 463.)

As a matter of fact, however, *we now discover* that the clock cards of Adamson do show the presence of the witness on August 25th, 26th and September 7th and 18th, but they also show his absence not only on the four Sundays that have been mentioned but on Monday, September 6th. These clock cards also show that Adamson's usual quitting time for the day was between 4:40 and 4:50 P. M., and that on only eight days did he work overtime as follows: August 27th until 6:02 P. M.; August 31st until 6:47 P. M.; September 3rd until 7:37 P. M.; September 15th until 9:03 P. M.; September 16th until 7:10 P. M.; September 18th until 8:05 P. M.; September 20th until 7:40 P. M., and September 21st until 7:35 P. M. (Exhibits R. A. 99, 100, 101, Record II, 330, 331).

The witness, not being present on Monday, September 6th, a holiday, on which the men all received double pay and which in turn was doubled in respondent's bill, still vouches for the correctness of the time on that day with perfect freedom, Boyer (I, 213), Strowenjans (I, 216), Higgins (I, 217), Martioli (I, 219), Hay (I, 221), Kasener (I, 224), Wilson (I, 225), Wojdacki (I, 225), Schafer (I, 227), Pennycott (I, 230), Mello (I, 230), Chandler (I, 232), Thomas (I, 232), Young (I,

234), Doig, Jr. (I, 235), Francisco (I, 239), Wm. Schmidt (I, 244), Turner (I, 245), Furman (II, 377), Reed (II, 386) and Williams (II, 390).

His testimony, therefore, covering the Sunday cards of August 29th, September 5th, 12th and 19th, and the cards just referred to of September 6th, when viewed solely in the light of his testimony concerning the Sunday card of P. Mockel of September 12th referred to supra (I, 204, 205), becomes valueless as to them and casts discredit upon his entire testimony.

Again, as bearing further upon the question of the accuracy of libelant's shop time card proof, we refer to the personal cards of the witness of August 25th, 26th, September 7th and 18th which were *not* produced when called for by the respondent, and no reason given for their non-production. As we have shown Adamson was present in the shop on these days, and furthermore vouched for the accuracy of the time worked on those days by the following 34 workmen: C. Schmidt (I, 198), Benson (I, 201), Boyer (I, 212, 213), Martioli (I, 218), Hay (I, 221, 222), McDonald (I, 222, 223), Kasener (I, 224), Megow (I, 225), Wojdacki (I, 226), Peaslee (I, 227), Larrando (I, 227), Williams (I, 229), Pennycott (I, 229, 230), Chandler (I, 232), Thomas (I, 232, 233), Young (I, 234), Peterson (I, 236), Hicks (I, 237), Vasen (I, 238), Francisco (I, 239), Cuthbert (I, 244), Wm. Schmidt (I, 244, 245), Turner (I, 245), Heath (I, 247), Furman (II, 377-383), Hicks (II, 378), Holmquist (II, 380), Acosta (II, 381, 384), Stewart (II, 384, 385), M. B. Albers (II, 385), De Pasquale (II, 387), Blake (II, 392), McConky (II, 393) and Boehle (II, 396).

Considering the care taken by counsel to secure an accurate record, and that these cards of Adamson's were called for on two occasions, we must, in the absence of even a suggestion of their loss, assume that there was a reason for their non-production and that, had they been produced, they would have revealed matter detrimental to libelant's case—matter affecting the testimony of the witness. In view of Adamson's testimony supra: "The time cards were turned in all the time", and the further fact, as we shall later have occasion to show, that the "Hilonian" bill was made up from them, it is perfectly clear that, if these non-produced cards of Adamson's *showed "Hilonian" work,* as did his other cards which were produced, then, as the bill incorporated a charge for that work, it necessarily follows that because of a lack of proof the bill must be incorrect to the extent of the value of the unknown number of hours shown by these withheld cards. But counsel certainly did not deliberately withhold proof of that character in view of his attention having been called to the matter twice. We must, therefore, be forced to the other and more natural conclusion that Adamson's cards for those four days were not produced because they failed to show, that on those particular days, he had done "Hilonian" work. Counsel dared not give that as a reason for their non-production for, if our surmise is correct, we know, and counsel must have known, that it completely destroys the value of Adamson's testimony covering the work done by men on those days. If Adamson handled no "Hilonian" work himself on August 25th,

26th, and September 7th and 18th, and yet worked, as his clock cards show, all of those days, and his work was on other jobs, then as to "Hilonian" work done by the other men his testimony would not apply:

> "I take note of when I give the man the job and I know when the job is finished and the time it comes off the machine, and then I know what time he has been on it, I know how long it takes."
>
> (I, 191.)

for it was solely because of his personal handling of "Hilonian" work, marking it off on the surface table and thereafter turning it over to the men, that gave him the opportunity for the supervision which he claimed. If the supposition which we have indulged in was in truth the reason for the non-production of these cards, then the witness is discredited to an extent which should, we submit, lead the court to a rejection of his entire testimony vouching for the accuracy of the time of all of the 73 men covered by his evidence.

Even at the risk of tiring the court by further discussion of this man's testimony, we will take one further step in our analysis of it for the reason that, to show beyond peradventure, the inaccuracy of libelant's shop card proof made through Adamson, affects beyond reparation libelant's entire case. Eliminate Adamson and it is not possible for a quantum meruit value, such as is contended for by counsel, to be established, for, beyond all fear of contradiction, we say that upon his testimony alone depends the proof of the labor performed in the shop by 58 of libelant's men. Finally, therefore, we propose to discuss as briefly as possible

the night or overtime work said by Adamson to have received his supervision and approval.

This is a class of work that for 22 out of the 30 days of the job Adamson did not and could not have seen done. His method, therefore, of checking the time heretofore shown could not apply to this class of work. In truth it would seem that night work on the "Hilonian" during Adamson's absence, would most properly be classed as not to be guaranteed by him for the same reason he gives for refusing to vouch for the Sunday, September 12th, card of P. Mockel—he "was not there to check it up", he "could not guarantee that he (the workman) *had been there*" (Adamson, I, 204, 205). On his cross examination, therefore, he is asked to explain this checking up of night work during his absence:

> Q. Who kept the time, and who superintended the work of the men in your shop and in your department at night when you were not there, during August and September, 1909?
>
> A. I did so long as I was there until I went home.
>
> Q. That is not answering my question.
>
> A. I am not finished.
>
> Q. All right; I beg your pardon.
>
> A. I knew the job the men were working on and I could have a good idea how long it would take them to do it, and what amount of work they would put on it during the night that I was not there, so that I could verify whether they put the work on it or not.
>
> Q. In other words, you were the night timekeeper for the nights when there was work being done, and you were not present in the shop?
>
> A. It was not necessary that I should be present in the shop every hour of the day even during

the day to know that a man was doing the work assigned to him. A man might be working two or three hours on a job and I might not see him although I was in the shop and I would check it off. It is just the same in regard to this night work. I knew what he was working on when I left the job and I would know what amount of work was done, and the time it was finished.

Q. Whether it was necessary or not, please answer my question. Were you the night timekeeper when work was being done in the shop and you were not on duty?

A. It was my duty to check the time that was worked on these pieces even at night.

Q. When you were not there?

A. I never checked them off when I was at home; I always checked them off when I was at the works.

Q. The work that you checked off at night when you were not there, was work performed when you were at home, is that correct?

A. Yes, sir. I could not be expected to be there night and day all the time.

Q. So that you had no other night timekeeper except yourself?

A. No, sir, not to my knowledge, not that I can remember.

(II, 461-462.)

Here then is shown a vast amount of time worked at night, proof of the accuracy of which is dependent upon the *"good idea"* of the witness. Let us take an illustration:

Adamson's clock card (R. A. 101) shows that on Monday, August 30th, he was not present at the shop after 4:47 P. M. William Schmidt is shown by his clock card (R. A. 94) to have left the shop that day

at 10:14 P. M. Counsel asks this court to believe that Adamson had personal knowledge that this man had worked for 5½ hours on the "Hilonian's" crankshaft after 4:47 P. M. That is what Schmidt's time card shows and his time card seems to have Adamson's check mark on it too, but Adamson's knowledge, we submit, must be personal and independent of the time card. Is it possible therefore that Adamson could have such knowledge of the record made by this man after 4:47 P. M.? The workman *might* have worked 5½ hours on the crankshaft, but there was no timekeeper there and he *might* have loafed or not worked at all. He put down on the card 5½ hours but that is no proof. Under these circumstances is it still counsel's claim that William Schmidt's 5½ hours of overtime on August 20th has been legally proven as a part of the quantum meruit value of this repair work?

The more the attempt is made to bolster up Adamson's method of vouching for the overtime night work performed when he was not there, the clearer it becomes that counsel's method in making his proof is defective. If, in the beginning, the *"good idea"* of known experts had been secured and there had not been such implicit reliance placed upon the *cost to the libelant* of the work; we submit libelant's proof would have been legally in better shape, though we think in such event no suit would have been brought, for the "good idea" of experts would not have harmonized in the right direction with the cost of the work to the libelant.

Night overtime shop work was performed on the "Hilonian" every day from August 24th to September 22nd, both dates inclusive, while Adamson was present after 5 o'clock during that period only on eight occasions. This general statement will give the court some idea of the situation.

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(4) RE-IDENTIFICATION OF ADAMSON'S WORK BY 15 OF THE WORKMEN.

Let us now pass to a brief analysis and discussion of the testimony of the 15 men in the machine shop department who were called to vouch for their own cards, and thereby "remove all doubts as to the accuracy of this record" (III, 775). An examination of the testimony shows that with the exception of the witness, Chandler, these men on their direct examination stated the method used by each in keeping his time. Wilson kept *mental* note of the time worked under each number, but recorded it on the time card as each job was finished (III, 774); Thomas did the same (III, 783); Schafer did the same (III, 793); Mockel kept his time record *on a slate,* putting down the hour it was commenced, the hour it was finished and transferring to his card the resulting time consumed (III, 800, 801); Benson followed Mockel's plan, using *a piece of paper* instead of a slate (III, 811); Stimmel did the same, using an *old time card* (III, 816) or a piece of paper (III, 821); Pennycott, the same method (III, 828, 835); Mello, if it was a long job, kept *mental* track of his time, if a small

one he generally noted it *on his machine* (III, 839); Young used either a *slip of paper* or the card itself (III, 847, 848); Wojdacki kept *mental* track of his time and transferred the resulting time to a piece of paper or a sheet of iron, and from that to his time card (III, 855); Boyer, whose work was all *night* work, would keep track mentally and, after putting down the time on a *yellow slip of paper,* would transfer this to his card (III, 892, 893, 902); Hay, the crane man, when the shop was busy, kept his time *in a book* (III, 905, 906); Strowenjans kept the hour of beginning and completing a job *mentally,* but the resulting time was put on his machine and from there transferred to his cards (III, 921); Larrando kept the hour of commencing a job and the time consumed on a *piece of paper,* transferring this to his card at night (III, 1001); Chandler's method of keeping time does not appear (IV, 1420).

The important fact to be noted in all this is the care taken by counsel to bring out *the actual record* of the time made contemporaneously with the work. Of course, the reason for this was to show the employment of the only practical means possible to record the time with accuracy.

Wilson explains his reason for putting down the time of commencing and finishing a job in these words:

> "At the end of that hour I put down what I did and the number of hours on the job, when the job is finished—each job. On some days there is more work than others and I could not carry it if I did not place it on the card."
>
> (III, 778.)

And again he says:

> "I had no other way of keeping track of my time."
> (III, 781.)

Stimmel's object in keeping track of his time on a piece of paper was:

> "Because we have so many different numbers sometimes in the shop. A lot of work comes in and sometimes we may have six or eight different numbers on the card and sometimes we would not."
> (III, 821.)

And even then the witness says:

> "Sometimes you might make a mistake."
> (III, 822.)

We submit that an examination of this record carries with it, by necessary inference, the absolute unreliability of Adamson's alleged checking, and we learn more than this, from the testimony of these men, bearing on the credibility of Adamson, namely: That these time cards were never handed to Adamson as he all along testified, but were by each of the men passed into the office to the timekeeper without previous checking by any one, and it was the timekeeper and not Adamson who made corrections when there were found mistakes in the time (Stimmel, III, 817, 818; 821; Wilson, III, 780; Mockel, III, 805; Thomas, III, 789, 790, 791; Schafer, III, 796, 797; Mello, III, 844; Young, III, 854; Boyer, III, 896; 902). These corrections were made from the time clock (Thomas, III, 790; Stimmel, III, 822, 823; Pennycott, III, 837; Mello, III, 845).

The evidence of these men also shows that, even with their respective and varied methods of keeping time, mistakes would crop in. Wojdacki, in attempting to explain a mistake in time found by the time keeper on one of his cards says:

> "* * * We would get rattled once in a while * * *. We did not know whether it would be right to put the exact number of hours worked or whether to put nine hours."
>
> (III, 861.)

And again another witness:

> Q. So there is a chance of your making a mistake once in a while on the hours?
>
> A. A fellow is liable to do that.
>
> (Young, III, 854.)

We have previously referred to Chandler's omission to give his method of keeping time. This man was a machinist and did the babbitting work on the "Hilonian". He remembered the work for "it was the biggest job I ever did of that kind" (IV, 1225). It would seem that here then was a man peculiarly fitted to identify his own time cards, for he had an independent recollection of his work, which it is not shown any of the other men had. Adamson had vouched for the cards of 18 separate days' work performed by Chandler (I, 232) and yet, for some undisclosed reason, when Chandler is recalled for the express purpose of bolstering up Adamson's testimony, counsel presents to him but two out of the 18 cards,—cards of September 5th and 6th (one a Sunday and the other a holiday). He is shown these cards and asked: "If those are time cards made

out by you for work performed on those dates *and if they are correct?"* His answer is: *"They are both in my handwriting"* (IV, 1421). Of course, this testimony, and it is all that the witness gives on the subject of the correctness of the two cards, is insufficient to make them legal proof as against this respondent. But the remarkable thing is that counsel, while admitting that "it is a *part* of an exhibit already in, Adamson No. 52", thereby showing that the omission was not an oversight, fails to question Chandler on the other 16 cards. Five of them show night work but, as that was a class of work that Adamson was least posted on, that fact would seem to present an added reason for Chandler vouching for them. There must, therefore, have been some compelling cause for not calling attention again to these cards and submitting the author of them to cross-examination. Perhaps later on in this brief we may be able to suggest what the reason was. At any rate, as the witness' testimony as to the two cards which were offered failed of legal proof, the status of the whole set of 18 is left to be determined solely by the testimony of Adamson.

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(5) IRREGULAR SHOP TIME CARD CHARGES.

(a) *The allowance for 9 hours for shop work when but 8½ hours of work were actually performed.*

There is no dispute as to the fact that on shop work libelant's bill is based upon a charge for 9 hours of straight time work, and on ship work on a charge of 10

hours of straight time when only 8½ were actually performed (III, 863). The excuse for this palpably inequitable overcharge is, that at the time of the "Hilonian" work, there was in force an agreement between the libelant and certain labor unions, by which libelant was obliged to pay its workmen the same rate for 8½ hours of work that it had formerly paid for 9 or 10 hours (Hough, IV, 1348-1353). This agreement, the carrying out of which counsel designates as a custom, was not known to the Matson Navigation Co., and we ask the court's judgment upon whether we are to be affected by it in the manner proposed by libelant's bill. If so it means that shipowners are chargeable with notice of private agreements between repair shops and labor unions affecting the price to be paid by the shipowner for repair work when such work is done by union labor. Not only that, but in this case the result of the agreement is enforced against the respondent for *non-union* work as well as union work. We do not know to what extent, but Francis Dolan, the foreman pattern maker, is one who was not a member of any union (I, 166), and there may have been scores of others. Repair shop men may complain that union labor's strength in this locality is such that they have been forced to this method of increasing the pay of labor union men, but we venture to assert that, if all repair bills were to be rendered on the basis of the one at bar, the agreement with the unions would prove advantageous to both parties. Let us look into the matter.

The evidence shows workmen are classified and paid a certain rate, depending upon their class (IV, 1348).

Libelant's bill charges the full *number of hours* of this classified labor shown by the time cards, which includes in the case of shop work 30 minutes and in the case of ship work 90 minutes of *unemployed* time. The hour rate charged is an arbitrary one, including overhead expenses and a profit. The result follows that, as you increase the hours charged, which do not represent actual labor performed, although the shop has to pay for such hours at the classified rate, its charging rate wholly absorbs the classified rate and includes besides expenses and a profit. That is, the hourly billing rate includes three distinct items: the full classified rate paid the workmen, the overhead expenses and a profit. If these three items were to be confined to *the actual time worked* the charge would be fair, but when each hour of *unemployed* labor billed to the shipowner includes, not only a complete reimbursement charge covering the amount paid the workmen and expenses, but also a *profit,* then we submit the charge, in so far as it includes such *profit,* is inequitable,—its basis is fictitious and the shipowner receives no benefit. Such a charge partakes of the nature of a bonus on a transaction that has cost the libelant nothing and from which respondent gets no return. The equities would seem to require that there should be a *quid pro quo,* and a shipowner will never consent to such a charge being included in the reasonable value of work until this court declares upon the question. Furthermore, there appears an analogous feature of this billed labor rate which calls for criticism. The record shows that libelant had no governing rule as to how this unemployed period of

time was to be divided in cases where several job numbers were operated on in one day. The matter was left entirely to the discretion of the individual workmen (III, 918, 919) and, of course, confusion resulted. One man stated they got "rattled" over the problem as to how the hours should be apportioned (Wojdacki, III, 861); another said they charged the unemployed time to the biggest job (Hay, III, 915); another said he could not tell how it was apportioned (Strowenjans, III, 928); while every man who said he put down the *actual* time worked after each job number simply added to the general mixup for, of course, these men were all mistaken (Boyd, II, 653, 654; Grotifend, III, 967; Macdonald, III, 972, 973; Larrando, III, 1003; Ferro, IV 1310, 1322-1324. See also Siverson, IV, 1126, 1127; 1129, 1130).

Aside then from the question as to whether any *profit* on this unemployed time should be billed to respondent, it must be clear that, if libelant's proof fails to show that the apportionment of this unemployed time *was not equally affected,*—that is, that the "Hilonian" job numbers were not charged with more than their just proportion of it, such omission is fatal to libelant's case. This, we contend, is the exact condition of the proof.

(b) *Overtime.*

"Straight time" covers work performed, either day or night, during regular hours on ordinary week days. "Overtime", on ordinary week days, is the time which commences to run at the end of "straight time". For instance: A man on the day or night shift working

beyond 8½ hours is working "overtime", the 8½ hours is "straight time".

The record is clear to the effect that in order to entitle a workman to overtime pay he must first have worked straight time, and when we come to a discussion of the ship work, as shown by Putzar's time sheets, we shall have more to say of this rule.

A man whose shop card shows 9 hours has, as we have already shown, only worked 8½ hours and his overtime commences, of course, at the expiration of the 8½ hours. If at the expiration of 8½ hours, he should work for half an hour longer, the result would be that the total hours *worked* would be 9, and yet respondent *is billed for 9 hours of straight time and one-half hour "overtime"*. We submit that such a proceeding, and it is the one followed in this case throughout, is adding insult to injury and should not receive the approval of this court as establishing the quantum meruit value of this work.

(c) *Miscellaneous Irregularities.*

As we have already pointed out there are admitted contracts shown by Schedules 4 to 10 of the libel, besides other contracts between the parties which are not shown by the pleadings. Our contention here is that libelant's disputed quantum meruit Schedule 1, is compiled in part from time card charges for work performed under these contracts, the result being that this schedule, as to shop work, is a clear duplication. The task of segregating the items, which we claim constitute such duplication, has been a large one and our list does

not pretend to be complete, for Curtis says that some of the time cards introduced show work performed *under contract numbers,* and that such had been *necessarily* introduced because the same cards show *quantum meruit job numbers,* but that the labor on these cards under these contract numbers has not been charged in Schedule 1 (IV, 1436). We have our doubts about this but in making our segregation Curtis gets the benefit of the doubt, for we have refrained from including in our list all cases of contract work appearing under its appropriate contract number on a card having an appropriate quantum meruit charge under an appropriate quantum meruit number. So that the cards on which our claim rests are those where contract work shows on the face of the card *after one of Curtis' quantum meruit job numbers,* or else cards showing work where *the only* "Hilonian" numbers on them are *contract numbers,* or cards of a mixed character where both the above situations appear. The list is of such magnitude that we have thought best to place it in this brief as an appendix (see Appendix I) and because the instances of these irregular charges are so numerous we submit that they cannot be explained on the theory of a mistake or an oversight.

Curtis' testimony is perfectly clear that Schedule I is made up of quantum meruit charges shown on the cards under job numbers 5295, 5297, 5296, 5318, 5346, 5360, 5325, 5394 and 5398 (IV, 1433). He also says that the contract schedules were worked on under the following numbers: Schedule 4, 5295; Schedule 5, 5390; Schedule 6, 5317; Schedule 7, 5401; Schedule 8, 5009; Schedule 9,

5389; Schedule 10, 5313 (IV, 1434). Since these shop time cards were introduced in evidence Curtis has tabulated and classified the hours found on them charged to the respondent and has compared the result of his work with the hours charged in Schedule 1 of the bill (IV, 1485-1486). It is true he says they do not agree, but the disagreement turns upon a matter of *mathematics* and not an oversight *in the introduction of evidence* (IV, 1481-1484). These cards were originally selected by Curtis and introduced in evidence under his supervision as the basis of his bill covered by Schedule 1, and his inspection of them, since their introduction, without a word of comment as to the *impropriety* of any of them as proof in the establishment of a quantum meruit value of the labor charged; certainly forecloses any excuse for their introduction founded on the plea of an oversight or mistake.

As pertinent to the duplication charges for "main bearings" (contract work covered by Schedule 8), Mr. Gray in his rebuttal evidence attempts to construe this contract as calling for these bearings in the "rough finished" (VII, 2386, 2452). The witness, however, is contradicted by his own bill for it reads: "Cast and *finished* 4 new bearing boxes for main journals" (Schedule 8-138). Furthermore, Appendix I shows that this work, with but one exception, was all done under job number 5295 and, as that was the number given to the original specification work when it first went to the shop, and as Mr. Gray would make it appear that "*finishing*" the bearings was an extra, why was not this extra work given a job number of its own?

(Dolan, I, 173; Wilhelmson, III, 1017). Furthermore, the charges on "main bearings" shown on the time cards range in point of time from *August 24th* to September 20th. Surely the work of *finishing* (VII, 2386) did not have a commencement so early and an ending so late. This main bearing contract was one of the prior contracts (VII, 2453) that required the "Hilonian's" presence at the yards of the libelant, and which led Gray to reduce his original bid. If his obligation only extended to casting the bearings or making them in the rough; why his desire to have the "Hilonian" placed in libelant's yards to complete this contract? The vessel's presence would seem not to be required to complete a contract calling for *rough* work only.

The ninth item of the specifications undoubtedly called for work on these bearings, but it was work to be performed on the *ship*, as is to be plainly seen from reading the specifications (I, 54); they were to be *"bored out in place"*, while the work shown by Appendix I is all *shop* work. Kinsman's testimony on this point is perfectly clear:

> Q. Was any shop work on the *main bearings* required to be done under the original specifications, or at all, except under Schedule 8 of the libel?
> A. No, sir.
> (V, 1894.)

Klitgaard's testimony is even more positive:

> Q. Do you know whether any shop work on the main bearing or main bearings was ever required under the original specifications? A. No, sir.
> Q. Do you know what work on the main bearings of the "Hilonian" would come under—what schedule of the libel?

A. Schedule 8 of the libel.

Q. Do you know whether work on the main bearings would come under any other schedule than Schedule 8?

A. No. 9 of the original specifications.

Q. Would that be shop or ship work?

A. That would be ship work, no shop work.

(VI, 1962, 1963.)

Neither of these witnesses was cross-examined on this point.

An examination of Schedule 4 will show that it has impressed on it job number "5295" and Curtis says:

A. Schedule 4, all of the material and labor on Schedule 4, was performed and furnished on order 5295.

(IV, 1434.)

The fact that Schedule 4, a contract, shows on its face job No. 5295, *a quantum meruit* number, required some explanation so Curtis proceeds to explain that the work on the "*spring bearings*" was commenced under No. 5295 and a price was then agreed to for the work and, as soon as this became known to him, he took the matter up with the foremen of the different departments and segregated from No. 5295 the time and material belonging to Schedule 4:

"* * * I did this by taking the cards as they were turned in each day, consulting with the foremen and the men that performed the work both as to the time and the material consumed on it, and withdrew these cards."

(IV, 1435.)

In this way does the witness explain his *indiscretion* (or Barker's, the bill maker), in thereafter placing No. 5295 on respondent's bill for the spring bearings and other work shown as contract work on the schedule. But Mr. Curtis will have to explain further.

If these cards were *withdrawn* "as the work went along", and this spring bearing work is not included in Schedule 1 of the bill, why do we find in the record the cards of Chandler, the man who did all of the babbitting on these bearings (IV, 1226), showing work on them on September 2nd, 3rd, 4th, 6th and 8th? Why do we find the time cards of other men showing this spring bearing work? And why is libelant introducing *stock cards* thereby charging respondent with *material* for these spring bearings (Robert's Stock Cards A6448; S. M. Roberts' Stock Cards A1820 and 1834; Taylor's Stock Cards B9529, B870); and why is respondent charged with ship time work on "spring bearings" (Putzar's Time Sheet 38)? Why, may we also ask, does Curtis say that the spring bearing work was "*commenced under 5295*"? Chandler's first spring bearing work was shown on September 2nd, and on that date Chandler gives the work *two* numbers, 5295 and 5325, but thereafter and on September 3rd, 4th, 6th and 8th he numbers the work only 5325. The other workmen with but two exceptions, all give to spring bearing work *job number 5325.* Furthermore, the spring bearing work on the stock material cards just referred to is all No. 5325, and besides the stock cards mentioned, the following show

material furnished to "bearings" under No. 5325: S. M. Roberts C2784, C2777, C2774, C2764, C2747 and A1772. The material furnished, as shown by these cards and charged to respondent, must have been furnished to the *spring* bearings for the material furnished to the *main* bearings, as shown by the stock cards, is furnished under job number 5295 (see, for example, S. M. Roberts' Stock Card A1897).

We are very much afraid that Curtis should be given another chance at making explanations. Indeed, his failure with reference to Schedule 4 casts a doubt on his testimony with reference to the job numbers said to have been given to the other schedules and, in this connection, it may be well to inquire what Curtis has to say to his statement that all work done and material furnished Schedule 9 (the smokestack contract) was under No. 5389 (IV, 1434), when we point out that not only does Putzar's time book show that the smokestack work was No. 5360 (Sheets 42, 48, 72), but also the stock material cards show the same thing. (A. Robertson's Stock Cards B1071, B1078, B1087, B1804, B1894, B1897, B3631, B3635, B5646, B5658; Taylor's Stock Cards B9540.) All of the above by the way being charged to respondent in addition to the contract, and all of them clearly representing material covered by the contract.

It must be apparent that, if the business of libelant was so loosely conducted that its labor and material

cards, *for the same work,* are found to have been turned into the office *under two separate job numbers,* then, of course, bills compiled from such records are hopelessly in error. While the size of the record forbids an exhaustive examination, we have made a cursory one which we believe sufficiently establishes our claim that the situation referred to exists. We herewith submit some illustrations:

						Charged to
Hagland's	Ex.	8	Sept.	18	"Angle rings"	5360
"	"	9	"	14	" "	5389
"	"	11	"	16	" "	5295
Shepard's	"		"	15	"Details for brake"	5295
Adamson's	"	99	"	15	"Brake, etc."	5398
"	"	52	Aug.	30	"Thrust collars"	5295
"	"	52	"	31	" "	5325
"	"	70	Sept.	15	"Collars"	5398
Gardner's	"	3	"	8	"Smoke stack plate"	5360
"	"	10	"	15	"Flanging stack"	5389
Adamson's	"	52	"	5	"Crank brasses"	5295
"	"	52	"	6	"Crank pin brasses"	5325

(Crank brasses and crank pin brasses mean the same thing—IV, 1422.)

Adamson's	Ex.	52	Sept.	6	"Eccentric straps"	5325
"	"	51	Aug.	28	" "	5295
"	"	51	Sept.	16	"Eccentric guards"	5398
"	"	52	"	2	"Spring bearings"	5295
"	"	52	"	2	" "	5325
"	"	51	"	21	"Crank bearing wrench"	5398
"	"	51	"	20	" " "	5325

					Charged to
Adamson's Ex.	26	Sept.	4	"Thrust collars"	5295
" "	27	"	20	"Thrust collars and manifold"	5398
" "	10	Aug.	31	"Thrust collars"	5325
" "	10	"	30	"Babbitting thrust collars"	5295
" "	6	Sept.	17	"Bearings"	5401
" "	117	"	15	"Brake rod"	5401
" "	21	"	16	"Balance cyl."	5295
" "	31	"	18	"Balance cylinder"	5398
" "	94	"	10	"Eccentric straps"	5325
" "	93	"	10	" "	5295
" "	90	"	20	"Main bearings"	5398
" "	37	"	6	" "	5295

The elaborate system of supervision and checking, which Curtis says these cards are put through, would seem to make this confusion impossible, as for instance: How could a card showing work on so important a contract as the "main bearing" contract, whose job number Curtis says was 5009, be allowed to pass through his system of checking unnoticed, bearing job No. 5398 or No. 5295? Of course, if there was a deliberate attempt to confuse the work and make the checking of it practically impossible, then, of course, to give to the same character of work two or three different numbers was the proper way to go about it (see Curtis' explanation of why job No. 5295 contains work not included in the original list of No. 5295. If the court can understand the witness it is to be congratulated—we can't. Curtis, IV, 1463).

(6) THE MATERIAL CARDS.

We will now briefly refer to these documents introduced by libelant as proof of its *material charges.* Here again we find evidence of libelant's unbusinesslike methods, but we will forbear any lengthy discussion which we believe unnecessary, simply calling attention to the fact that stores and material could be and were doled out by the custodians thereof in a most promiscuous fashion and on almost anybody's sayso. At times the storeroom was in the sole custody of a boy sixteen years old, and for libelant to contend that such is a proper custody is ridiculous.

It would serve no useful purpose to take up in detail the hundreds of stock material cards and cull from them the irregularities shown on their face. However, that there are such irregularities should in some measure be pointed out, and this we will briefly do.

As the court knows there is an admitted contract among the schedules of the libel for gratings, floor plates, etc. It reads as follows:

> "Repairs to ladders, floor plates and gratings in engine room as per agreement."
>
> (Schedule 5, I, 37.)

An examination of the material cards discloses that material belonging to and used in the subject matter of this contract have been handled and recharged to respondent under at least four separate "Hilonian" job numbers, namely: 5398, 5346, 5325 and 5390, the latter number, according to Curtis, being the contract number, and the other three quantum meruit numbers.

						Charged to
Taylor's	Stock	Cards	Sept. 18	B8603	"Gratings"	5398
"	"	"	" 10	A 491	"Ladders and gratings"	5398
"	"	"	" 11	A 493	"Gratings"	5398
"	"	"	" 14	B9504	"Gratings and ladders"	5346
L. K. Siverson		#2	" 6	A2501	"Gratings and platform"	5325
"	"	"	" 6	A2502	"Gratings and platform"	5325
"	"	"	" 9	A2536	"Gratings and platform"	5325
"	"	"	" 11	A2565	"Gratings"	5325
S. M. Robinson		"	" 17	A1733	"	5390
A. Robinson		#1	" 16	B1510	"	5390

If this is the situation affecting one of the admitted contracts, there can be no reason for believing otherwise than that a minute examination of all of these hundreds of material cards would reveal a similar situation respecting all of the contracts. We disclaim any intention of charging premeditated wrong on the part of the libelant, for our attack is intended to point out the mistake of counsel in attempting to depend upon proof so loose and palpably unbusinesslike as were these time and material cards used by the libelant. The system was absolutely unreliable and full of error, as for example.

What is the explanation or excuse offered for giving to material used *on the same identical job* several different job numbers? We have just shown the situa-

tion with regard to contracts for ladders, gratings, etc., but there are innumerable other instances: Material used on *"vapor line"* is given three different numbers: Lentz's stock cards, Sept....., A6058, No. 5298; Sept. 18, A6059, No. 5398; L. K. Siverson's stock cards No. 3, Sept. 20, A6334, No. 5325.

Material used on *"water service"* is given three different numbers:

L. K. Siverson	#3	Sept. 16	A6307	#5325
Lentz	#1	Sept. 22	A6094	#5398
Fred Boyd		Sept. 16	C6896	#5295

What is lebelant's explanation for charging respondent with 41½ lbs. of challenge metal on September 4th for use on eccentric straps under job No. 5325, and on the same day and on the same card charging it with the same amount of metal to be used on eccentric straps and charging it under job number 5295? (Adamson's stock cards, Sept. 4, A1184.)

What is the explanation for charging respondent with candles used on the ships *winches?* (Fred Boyd's stock cards Aug. 24, A1655.)

What is the explanation for charging respondent with bolts and rivets and candles in "taking down" and "removing" the "Hilonian's" smokestack, when it was under contract *to remove the old* and install a new smokestack for $900? (A. Robinson's stock cards Sept. 10, B1071, B1078; Sept. 11, B1087, B1804, B5646; Sept. 17, B1894, B1897; Sept. 13, B5658.)

What is the explanation for charging respondent with material given out from the storeroom under job

No. *5395,* which is not one of the "Hilonian" numbers? (Lentz's stock cards No. 1, Sept. 7, A6158; Cronin's stock cards No. 1, Sept. 3, A2391-2393; A. Robinson's stock cards No. 1, Sept. 7, A5626.)

What is the explanation for charging respondent with the use of candles on the donkey boiler contract work? (A. Robinson's stock cards No. 1, Sept. 4, B5621.)

What is the explanation for charging job No. 5325 with material used on the *eccentrics?* (Adamson's stock cards, Sept. 11, A63); on the *rudder* (Id., Sept. 3, A31); on the *gudgeons* (Id., Sept. 14, A43); on the *stern posts* (Id., Sept. 14, A49); on the *valve stem* (Id., Sept. 2, A1154); on the *main bearings* (Id., Sept. 17, A1244); on the *main injection valve* (Id., Sept. 21, A1295); on the *thrust* (Id., Sept. 11, C5957); on the *strainers* (Id., Sept. 12, C5963); on the *testing of boilers* (Lentz's stock cards Sept. 20, A6066); on the *water line* (Id., Sept. 20, A6066); on the *cylinders* (L. K. Siverson's stock cards No. 3, Sept. 16, A6304); on the *drain pipes* (Id., Sept. 18, A6319); on the *bilge manifold* (Id., Sept. 21, A6357); on the *gratings and platform* (Id., No. 2, Sept. 6, A2501); *on the bilge pumps* (Id., Sept. 6, A2512); on the *tank tops* (Id., Sept. 10, A2552); on the *feed pumps* (Id., Sept. 9, A2544) and on the *sea valves* (Id., Sept. 10, A2563)?

It is useless to go on. The whole method and plan was wrong, and it is hopeless to bring order out of the chaos of such proof. What we have done by way of pointing out these irregularities shows clearly that material from the storeroom was easy to get, and so

long as you gave any kind of an old job number to the custodian, no matter where the material was to go, you got it (Cronin, III, 873, 874; Boyd, III, 877, 878; 881, 886). When we remember that separate job numbers were given to each particular class of work "*in order to keep track of it and to charge the work*" (II, 310; see also II, 295), we are amazed at the confusion wrought by some one through this simple rule's violation. These material cards are passed into the office to Barker, the material clerk, and from them he makes up the bills (Dolan, I, 156; see also Speed, III, 1022).

We will now pass on to libelant's proof of the labor performed *on the ship.*

Putzar's Time Sheets.

Libelant's labor proof, as we have previously intimated is not all of the same character for, while it uses its own time cards to prove the shop labor, to prove the ship labor it makes use of Putzar's time sheets. This latter method of proof is resorted to despite the fact that the same system of each man keeping his own time and putting it on a time card was in vogue both in the shop and on the ship.

It seems to be libelant's contention that respondent is bound by Putzar's time sheets, and that whether they be padded, false, irregular or whatnot, they are conclusive of the quantum meruit value of the ship labor. "The bill is made up from them" (Curtis, IV,

1491; V, 1529). They represent, says Curtis, a *daily* "settlement between the timekeeper and ourselves as to the day's time" (IV, 1491). "This (the time sheets) is a final settlement between the timekeeper on the ship and myself as to the time used aboard the ship" (V, 1528).

Holding this view of respondent's liability, as affected by its relations with Putzar, it is not remarkable that Curtis appears to have been insistent in securing Putzar's signature to these time sheets. "His signing that was then an agreement between us as to his vouching for the time" (V, 1517). "I got my sheets or my record that he handed over to me signed. * * *" "What I did want and what I did check and what I received his signature for is the list of the men and the hours worked on the face of that sheet" (V, 1523). "What interested me was my voucher for the time" (V, 1515). "I did not pay any particular attention to whether it was written in carbon, or whether it was written with indelible pencil or what, the only thing I noticed was the signature on them, and that was all I was after. I knew that that sheet was right because it has his signature on it" (V, 1516). "* * * He told me he would sign the sheets for me" (V, 1526).

It is clear from these excerpts that Putzar's signature to these time sheets was secured with the intention of foreclosing all discussion or argument as to the number of hours worked on the ship. It seems as though Curtis scented trouble and was preparing an invincible defense. Counsel takes the same view of

respondent's helplessness: "* * * I say these sheets are the sheets of your timekeeper that are passed into us as his determinative of the time upon that ship, and it is immaterial to us whether he signs it in carbon or ink or indelible pencil or what; if it is a statement of the account between the parties, and he has indicated it is correct, that is the end of the proposition" (V, 1518, 1519).

On cross-examination we find Curtis *defending* gross and palpable errors and duplications of time shown on Putzar's sheets in this style: "* * * We (Putzar and witness) checked it over and found it correct" (V, 1543). "* * * I know all the time is settled at the time with the timekeeper. These things are explained, and they agree. It has always been the custom" (V, 1559). "The explanation was made and settled with the timekeeper * * *" (V, 1559).

Counsel too adds his defense: "If it is a duplication Mr. Putzar is at your command any time to straighten it out for you; he is your man" (V, 1544, 1545). "What difference does it make what the timekeeper's duties are? He (Curtis) has told you over and over again the matter was gone over with the timekeeper and settled with him at the time. Do you expect to go behind the settlement made with the man authorized" (V, 1560)?

Referring to the time sheet allowances of double time, where it is not shown that the man has worked straight time, Curtis says in justification of this unjustifiable charge: "The explanation was made and settled with

the timekeeper, as it always is'' (V, 1559). Answering the suggestion that such a settlement or agreement was beyond the duties or authority of a timekeeper, the witness says: ''I do not go further than the timekeeper. I just deal with the timekeeper'' (V, 1560). ''No, sir, I do not know the authority of Mr. Putzar. I know he was timekeeper, and I don't go further than that'' (V, 1561).

We cannot agree with the libelant's contention, nor will this court, that the mere act of Putzar in signing these time sheets forecloses any attack upon them. We submit that at most they are but prima facie evidence against respondent, and it is clearly within respondent's legal right to point out wherein they are palpably wrong and irregular. However, in view of the position taken by libelant we believe it pertinent to briefly point out the relations existing between Putzar and both parties.

I.

THE RELATIONS EXISTING BETWEEN PUTZAR AND BOTH PARTIES.

The man was originally employed by Captain Matson after his name had been suggested by Mr. Gray (Saunders, V, 1764; 1813, 1814; Matson, V, 1663; Gray, VII, 2346, 2347), ''to keep time on the repairs of that ship'' (Matson, V, 1670). ''* * * there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the

loss or what the saving would be" if the crankshaft did not come out. "That is what they put a timekeeper on the job for" (Gray, VII, 2405, 2406; see also Saunders, V, 1767, 1768; 1815; Gray, VII, 2482; 2489, 2490). At the time of his employment he was not known to either Captain Matson (V, 1663) or Captain Saunders (V, 1816), and no other authority was given him except to keep time on the ship's repair work—"on the whole job" (Matson, V, 1670; 1674). During the progress of the work he made no reports to the Matson Navigation Co. as timekeeper (V, 1673), and it was a matter of months after the completion of the work before Putzar turned in to the respondent his time book (V, 1675, 1676), and up to that time he had made no report on his time (V, 1777) although he had been asked for one and had said he "would get it in as soon as possible" (V, 1776). This evidence of Captain Matson and Captain Saunders stands uncontradicted and is of vital significance in showing the relation existing between Putzar and the libelant, if Curtis' evidence is to be believed that Putzar rendered to *him* daily reports of the time as the work progressed.

On June 10, 1910, counsel for respondent wrote a letter to Mr. Putzar addressing it in care of the libelant. In this letter we told Putzar that by the "15th inst." information would be wanted in regard to certain items of libelant's bill and that, as he had had charge of the time kept for the ship, it seemed likely he could help us and requested him to call before the 15th. On June 17, 1910 (this was the date of the ser-

vice on libelant's counsel of our amended complaint) Putzar called up by telephone and asked what was wanted of him. He was told his assistance was needed in the ascertainment of certain facts connected with the case. He replied that he did not care to call on counsel but that at the proper time, if called upon, he would give his evidence, and it was not necessary that an interview be had. When asked if there was any difference between himself and Captain Matson he replied that he did not like Captain Matson's treatment of him in failing to give him a recommendation to the Portland Steamship Co. (McClanahan, VI, 2197-2199). After that respondent's counsel made no effort to call Putzar as a witness or to locate him (VI, 2200). At the close of the case the following interesting proceedings are shown:

> Mr. McClanahan. Will you take the stand a moment Mr. Curtis before Mr. Frank closes his case. I would like to ask you a question.
>
> Richard W. Curtis Recalled.
>
> Mr. McClanahan. Q. Mr. Curtis, Mr. E. L. Putzar is in your employ now is he not?
>
> A. Yes.
>
> Cross-Examination.
>
> Mr. Frank. Q. How long has he been in your employ Mr. Curtis?
>
> A. About a month and two weeks.
>
> Q. Previous to that time and up to the time of his coming into employ did you have something to do with him?
>
> A. No.
>
> (VII, 2592.)

We believe the foregoing briefly stated facts give some intimation of Putzar's relation to the parties, and as

we go further into the matter we believe the court will appreciate the hidden humor of counsel's sarcastic reference: "*He is your man*" (V, 1545).

We claim that although Putzar was employed as a timekeeper on the whole job, and the evidence is uncontradicted as to this, he did not keep the time on the whole job *or any part of it.* He certainly is not shown to have had anything to do with the "Hilonian" shop time, and we expect to prove from the record that as to his work connected with the ship time it consisted solely of copying the ship's time cards turned over to him by Curtis into a so-called time book, the detached duplicate or carbon copies of the pages of which form libelant's time sheet proof of the ship labor. If we are successful in making this showing, then we submit that Putzar's time sheets of ship labor, whether signed or unsigned, are not even prima facie evidence against the respondent in the establishment of the quantum meruit value of this work.

In view of the very serious attack made on Putzar's time books and sheets, as shown by the cross-examination of Curtis, and in view of the relation existing between libelant and Putzar, a relation which culminated in his entering into its employ during the pendency of the hearings in this litigation, we submit that it clearly was incumbent upon libelant to have called Putzar to the stand to clear up some of the vital defects in his work as shown by his time sheet record, and that he was not called carries with it an inference that does not help libelant's case.

Respondent Curtis' Exhibit No. 4 is the so-called time book which first came to the knowledge and into the possession of the Matson Navigation Co. when Putzar turned it over several months after the completion of the repairs (Saunders, V, 1777). Curtis' Exhibit No. 3 consists of carbon copies of the pages found in the time book and will be referred to hereafter, in distinguishing the two, as "time sheets".

II.

OUR CONTENTION THAT PUTZAR DID NOT KEEP AN INDEPENDENT RECORD OF TIME.

We will now take up the question of whether Putzar as timekeeper did more than copy into the time book the personal and unchecked record made by the men themselves as shown by their time cards, and, as bearing on the establishment of the truth relative to this matter, we ask the court to consider that Putzar knew the truth in regard thereto and yet was not called by either party. Respondent's excuse for not calling him, had his whereabouts been known, was his refusal to submit to an interview and his seeming hostility. Libelant's excuse for not calling him we suppose to be, that he was our agent and we are bound by his acts; therefore, why this unnecessary form of putting him on the stand? To which we reply that the record discloses a doubt as to the sufficiency and verity of these time sheets, and this doubt is of so strong and convincing a character as to appeal to astute counsel as

endangering libelant's proof. Therefore, as the circumstances point strongly to a friendly relationship, there could have been no impropriety in calling Putzar (to say nothing of the necessity), provided always that by so doing the doubt as to whether he actually kept time or had copied it could have been cleared up.

Reverting now to the testimony: Capt. Saunders says that at one time he saw Putzar using the time book in Wilhelmson's office and asked him what he was doing. He replied: "Writing up the time" (V, 1775, 1776).

Kinsman, the "Hilonian's" assistant engineer, says he never saw the time book before he saw it at this hearing; that he saw Putzar every day while the job was going on except Sundays (V, 1872); that he never saw Putzar checking off the men as they went on or off the ship, and that he recollects two occasions when it would have been impossible for Putzar to have done so (V, 1873).

Klitgaard, the "Hilonian's" chief engineer in charge, who was introduced to Putzar by Gray a few weeks prior to the commencement of the repair work (VI, 1922), says he saw Putzar writing in his time book and that was the only way he had ever seen Putzar keeping time. Not to his knowledge did he ever check the men on or off the ship (VI, 1923). He saw him using the time book in Wilhelmson's office, copying from yellow sheets into it, and he said he was "keeping his time" (VI, 1924); that he never remembers having seen Putzar on the ship at night although, with the exception of four or five nights, Klitgaard was

there every night, and on several occasions he had seen Putzar leaving the ship and taking the train at the close of the day's work, and that he reported for work "generally just about the time that the men turned to" (VI, 1925).

Mr. Siverson, libelant's foreman in charge of the engine room work on the "Hilonian", says he knows Putzar counted the men every day, and that he understood that he was up in the office every day and *signed* for certain time (IV, 1132). That is the extent of Siverson's knowledge of Putzar keeping time.

Christy says that Putzar was the adviser on the job and he kept time on the job (IV, 1286). This general evidence, however, is of no value for Christy disclaims having any intimate knowledge of the job.

Gray gave no testimony as to Putzar's manner of keeping time, and this brings us to Curtis, the only remaining witness in the case who has anything to say about Putzar's time keeping.

Curtis, although being content with the comparatively humble title of "chief clerk", has been with the libelant since he was eighteen years old, or for twelve years (IV, 1489), and in a general way he has had entire charge and conduct of the present litigation (V, 1591). It is hard to say just what detail of libelant's business did not come under Curtis' surveillance. He was the ever present factotum, operating sometimes openly and sometimes under cover. The workmen seem not to have known him for they make no mention of his name, and yet the timekeeper, Sjo-

berg, so many times referred to by all of them, turned out to be but Curtis' "assistant", and all these time card corrections, which everyone had heretofore supposed to have been the work of Sjoberg, turned out to have been instigated by Curtis. And the conferences, which the workmen always said preceded these changes by the timekeeper now turn out to be conferences between Curtis and the men and not Sjoberg (Curtis, IV, 1498). Truly he had a wonderful way of injecting himself into the minute and detailed business of his employer and at the proper time knowing nothing or everything about such business. He knew the duties of a timekeeper and expressed himself on that subject as follows:

> A. Well, the duties of a timekeeper are to keep the time in just as thorough a manner as he knows how, and to check up with the people that are doing the work for him.
>
> Mr. McClanahan. Q. Anything else?
>
> A. That is all; they handle the time.
>
> Q. That is all?
>
> A. They handle the time. That is, they check up the time and see the men are working on the ship, where they are, and where they come from, who they are, and how long they worked.
>
> (Curtis, V, 1561.)

This, however, is Curtis' theoretical opinion,—in practice a timekeeper is one who takes the time cards of the men, enters the time found on them into a time book and thereafter returns said cards to Curtis with copies of the time book sheets signed as "correct". The employment of this type of timekeeper, the practical kind, makes it unnecessary to preserve the ship

time cards; they are destroyed; and the bill rendered the shipowner is taken direct from the signed time sheets of the owner's agent. If the bill is disputed by the owner, why Curtis simply says "It is the result of an agreement between me and your timekeeper" (IV, 1470). He has examined it and says, "It is a fair bill and correct" (IV, 1474, 1475). Counsel seems to agree with Curtis on this latter proposition for he says respondent should pay libelant's bill "on the statement of your timekeeper that it is right. If you do not do that what do you put a timekeeper on for" (V, 1560)? When it comes right down to facts Curtis does not know the shipowner's reason for putting a timekeeper on a job, though he has had a great deal of experience with such timekeepers. "The purpose, *so far as I am concerned,* is that we should check up the time and the material when it goes into that job" (V, 1645). As to the value of a timekeeper to the owner who keeps only ship time when there is shop time as well,—Curtis is not disposed to know much about that phase of the matter.

> A. I am not the man to instruct the timekeeper what he should do and what he should not do. That is the duty of the owner of the property who the work is being performed for.
>
> (Curtis, V, 1647.)

Curtis knew Putzar as a practical timekeeper and this is the way the thing was worked: The ship time cards, after being "checked up" daily by the different foremen, were turned over to Curtis and he went through them by referring to the lists of work

which had been previously furnished by him to the foremen. If Curtis saw anything "wrong" or "cloudy" about the time cards he would refer it to the foreman or man on the job and would then and there straighten it out. As thus "checked up" by Curtis, the cards were *daily* turned over to Putzar (IV, 1427-1429). Putzar entered these cards daily into his time book, then checked over the time book entries with his "hand book", after which he turned back to Curtis the time cards together with his time sheets, duly signed and vouched for. These time sheets then became the daily "settlement" of the time worked on the ship.

In view of the uncontradicted fact that Putzar's employer never saw or heard of this time book, or these time sheets, until months after the "Hilonian's" repair work had been completed, the natural inquiry arises: What are the positive obligations of an employee towards his employer under these circumstances? Had Putzar any actual or implied power to thus covertly negotiate with libelant and settle the day's time on that ship? Was it not his sole and imperative duty to obtain an independent knowledge of the work being done, the time of its accomplishment, and transmit this to his employer? Putzar had no power to make settlement of time with the libelant, and libelant is charged with knowledge that such an act was beyond his province. He was employed at the suggestion of Gray for the purpose (*inter alia*) of keeping a check on the work for Capt. Matson who thought that Gray's bid was "still high". Gray was an officer of the

libelant and his knowledge is libelant's knowledge. How can it then be said that Putzar's "settlement" of daily time binds respondent, the very purpose of whose appointment would have been defeated if such a construction were to be put on his powers known to respondent to be purely ministerial,—he was to keep track of the time and nothing more. When the job was completed, the result of his independent work was to be harmonized, if possible, by respondent into the contract which had been entered into. As libelant would have it, Putzar each day passed beyond his ministerial function and became the arbiter and judge, and by his independent and sole decision settled and concluded with libelant the day's transaction so that at the end there was nothing to report, nothing for respondent to settle, only the obligation to pay. Furthermore, it was known to libelant that Putzar was to keep the time on the saving to be accomplished if the crankshaft did not come out. The crankshaft did not come out, how then could Putzar's daily settlement with Curtis be possibly taken advantage of unless there be found an entire waiver of the agreement and understanding with Gray about this saving which was to be determined by Putzar's work?

It is not necessary that respondent charge or prove active fraud in this matter. It is sufficient that the powers and duties of this agent are known to libelant, and that such agent acted beyond them. That such was the case can hardly be contradicted. Curtis says that Putzar agreed to a charge of ten hours for a day's work when but eight and a half were actually per-

formed (IV, 1471). Where in all the record is there to be found the slightest hint that Putzar had this authority? As to the improper overtime allowances Curtis says this thing was "explained" and settled with the timekeeper.

> Q. What thing is explained. This question of a man working on another ship, and coming to the "Hilonian" and being paid overtime on the "Hilonian"?
>
> A. I do not remember the exact details of that character. I do know if a man is ordered on a ship at night it is by somebody's orders that represents the ship.
>
> Q. Would the timekeeper have any authority to order a thing of that kind done?
>
> A. I do not go further than the timekeeper. I just deal with the timekeeper.
>
> (V, 1559-1560.)

This was clearly a thing Putzar could not arrange and settle, and libelant is charged with knowledge that it would have been beyond his power. Yet this allowance of double time was on the men's cards, Putzar copied it into his own time book, signed the time sheets and the trick was done. It will be noticed that this matter of double time allowance does not involve the keeping of time at all. It is solely a transaction, the validity of which depends upon a contract. As for instance: "A" reports for work at 6 o'clock P. M. and works until 2:30 A. M., or 8½ hours. Putzar receives this man's time card in the morning showing 10 hours' work, and transcribed into his time book an allowance of *20 hours*. Would anyone but libelant have the temerity to say that Putzar had au-

thority to bind respondent to such a palpably unjust overcharge? There is no evidence in the case showing that "A", prior to reporting for work at 6 P. M., had worked 8½ hours somewhere else, but even though there had been such evidence it would only be important as showing that the man's night work entitled him to receive overtime *from his employer,* and not that respondent, in the absence of a special agreement, should pay such overtime. Curtis by necessary implication says Putzar supplied the agreement.

Thus far we have discussed Putzar's time sheets on the theory that he, as Curtis says, checked them up with his "hand book". That Putzar had a hand book is vouched for by Kinsman.

> Q. How often did you see Mr. Putzar during the progress of the work?
> A. I saw him every day except Sundays—that is, every day I was on the job.
> Q. Did you see him with any kind of a book?
> A. He had a hand-book.
> Q. What kind of a book was that?
> A. Such as we all carry, a pocket-book.
> Q. A book that you carry in your pocket?
> A. Yes, sir.
> Q. When you say "we all carry" what do you mean?
> A. Everybody connected with a job of that description.
> Q. Did you carry one? A. Yes, sir.
> Q. Did Mr. Klitgaard carry one? A. Yes, sir.
> Q. Did Mr. Williamson carry one?
> A. I could not say that he did, but I presume that he did.
> Q. Did Mr. Gray carry one?
> A. Well, if I was in his position I would. I could not say that he did.
>
> (Kinsman, V, 1872-1873.)

Curtis, however, who had the general charge of this entire litigation, must have known that unless Putzar kept an independent record of the time, his time card copy work as exemplified in his time sheets would be of no avail. Therefore, Curtis says that Putzar told him he kept time in his hand book.

> Q. You keep referring to the handbook. I understand you never saw it but once, did you?
> A. No, sir, but he spoke about it a great many times to me; that is, whenever I would meet him, if there was any controversy came up he would say "my handbook says so and so." That is the reason I refer to it.
> Q. However, you did see the handbook once?
> A. I did see the handbook.
> Q. What did it look like?
> A. I cannot recall the size of it, or the shape of it.
> Q. That was on the inception of the work?
> A. I saw it afterwards, too, when she was over here on this side.
> Q. Then you saw it twice?
> A. I saw it twice; yes, sir.
> Q. Did you examine it when the ship was over here on this side?
> A. I did not look into his handbook at all.
> Q. You just saw it lying somewhere?
> A. He told me it was the handbook that he kept the time in. As a timekeeper I do not interfere with another man's record.
>
> (Curtis, V, 1571.)

It is therefore, upon Curtis' testimony alone that libelant's case depends. Curtis says Putzar told him that "it was the hand book that he kept the time in". All the facts and probabilities and inferences of this case tend to refute Curtis' testimony. Putzar in the

first place could not have kept the time of all the men, whose work is shown by his time sheets, in his hand book or in any other way, for the time sheets show 23 days of night work, and the following evidence refutes the idea of Putzar being present on the ship at night.

Q. State how often you were on the ship at night.

A. Pretty mostly every night; with the exception of four or five nights. I was on there every night.

Q. Were you on there every night when work was being carried on by the United Engineering works?

A. Yes, sir.

Q. Did you ever see Mr. Putzar on the ship at night?

A. I don't remember ever seeing him on at night; he may have been there, though.

Q. Do you remember seeing him on the ship in the daytime? A. Yes.

Q. Have you any knowledge of whether Mr. Putzar left the ship at the close of the day's work or not?

A. Whether he left the ship?

Q. Yes.

A. I know on several occasions I have seen him take the train.

Q. Do you know when Mr. Putzar reported for work in the mornings?

A. Generally just about the time that the men turned to.

(Klitgaard, VI, 1925.)

Q. Did Mr. Putzar occupy a room on the "Hilonian" during the repair work? A. He did not.

(Kinsman, V, 1872.)

Q. Did Mr. Putzar have a room on the ship?
A. No, sir.
(Klitgaard, VI, 1924.)

The only other evidence bearing on Putzar's presence on the ship at night comes from Curtis:

Q. Was Mr. Putzar on the ship at night?
A. I have seen Mr. Putzar around the ship at various times.
Q. Answer my question, please. Was Mr. Putzar on the ship at night?
A. I have seen Mr. Putzar on the ship at night.
Q. Were you on the ship at night?
A. I was over there one night when this man Knight was injured.
Q. On the ship, were you?
A. I was in the confines of the yard.
Q. But you were not on the ship?
A. No, sir, I was not on the ship.
Q. So that you did not see Mr. Putzar on the ship?
A. No, sir, but I saw Mr. Putzar in the yard.
Q. So you do not know whether Mr. Putzar was on the ship at night?
A. You see I was not there at night. I saw him at various times there.
(Curtis, V, 1567.)

If there is anything else in the record touching upon the question of Putzar's presence on the ship during the 23 nights on which his time sheets give detailed recital of the names of men working, the character of the work they were each engaged in, and the hours worked by each, we challenge counsel to produce it.

We submit that the testimony of Klitgaard and Kinsman just quoted carries with it an inference so strong

that it was incumbent upon counsel to overcome it if possible. Henry Nelson, one of libelant's *night* foremen, a man whose night time work is chronicled so minutely on Putzar's time sheets, testified in this case, but nothing is said of Putzar's keeping time. Nelson would have known of Putzar's presence if any one, yet he is not asked one word about the man (IV, 1185). This is at least significant. Indeed, we submit, it is so significant, this failure to make proof when you have it within your power to do so, that we are forced once again to invoke against counsel the doctrine of *The Joseph B. Thomas,* 81 Fed. 578. Furthermore, let us see what evidence there is of Putzar's hand book being used in keeping time of the men *during the day.* L. K. Siverson was libelant's foreman in charge of the ship's engine room day work. In his cross-examination we find the following:

> Q. Now, I want to call your attention to your testimony given with reference to the time-cards of the men working in your department on the ship. Do you remember you said that you checked up those time-cards with the timekeeper the next morning?
>
> A. Yes, sir.
>
> Q. What did you mean by checking them up?
>
> A. I mean that as soon as I had the men placed at the work and I possibly could spare a little while away from the work down on the ship I would go up to the office of the timekeeper, and he would have all the cards of my men that had worked the previous day stacked up and we would go over the cards, and one man would have his number of hours right and the job number perhaps right, and he would have the name wrong, or *vice versa,* he would have the name wrong and the number of

hours wrong, or the job number wrong, and I would tell the timekeeper that that man worked on so and so.

Q. Do you pretend to say now that you could the next day tell the correct number of hours that each man under you in your department was working on a particular job number? A. Yes, sir.

(IV, 1125.)

* * * * * * *

Q. You also spoke of Mr. Putzar as also keeping time. What do you mean by that?

A. I meant—I did not say that Mr. Putzar was keeping the time.

Q. What do you mean?

A. I said that Mr. Putzar was introduced to me as the company's representative and the man who was going to keep time, but Mr. Putzar did not confer with me on the time.

Q. Did you ever see him keeping time?

A. Mr. Putzar—you mean if he went around the men, or in which manner do you mean?

Q. I don't know. I am trying to find out whether you know anything about his timekeeping.

A. I don't know in which method he kept the time.

Q. Do you know that he did keep the time?

A. I don't know. I know that he was counting the men every day.

Q. He was counting the men.

A. He was counting the men over every day.

Q. Is that all you know about keeping his time?

A. I did not confer with Mr. Putzar as to the manner in which he kept the time, so I don't know.

Q. Did he confer with anybody else in your presence?

A. Not in my line. You know I did not have anything to do with the office. I understood that he was up in the office every day and signed for certain time.

Mr. Frank. What do you propose to do—to repudiate your own timekeeper, Mr. McClanahan?

(IV. 1131, 1132.)

Mr. Kinsman, who as the engineer in charge of the engine room crew during the repairs, has this to say:

Q. Mr. Kinsman, how much of your time during the repair on the "Hilonian" was spent by you in watching the work?

A. Practically all of my time with the exception of nights, Sunday and Admission Day, the 9th of September.

(V, 1871.)

* * * * * * *

Q. Mr. Kinsman, did you ever see Mr. Putzar checking off the men, employees of the United Engineering Works as they went on or from the ship?

A. No, sir.

Q. Do you know of any occasion where it would have been impossible for him to have done so?

A. Yes, sir.

Q. When was that?

A. Well, I recollect two occasions on leaving the ship carrying on a conversation with Mr. Putzar well up in the yard, where it would be absolutely impossible for him to check the men coming off the ship, and at the time they were coming off the ship.

(V, 1873.)

When the expression "checking off" is used, this witness understands its meaning as applicable to keeping time, for he had kept time himself, and in referring to how he did it says:

A. I kept time on that job by getting the names of the men, checking them in the morning, also seeing that they were on the job during and between

morning and noon, checked them in the afternoon and also seeing them on the job in the afternoon.

Q. Did you keep the time of the hours worked?

* * * * * * *

A. I kept the actual hours worked.

(Kinsman, V, 1874.)

Here again, we submit, is evidence that negatives the idea that Putzar kept an independent record of the time. Siverson says he counted the men but he does not know that he kept their time, Kinsman, who was there practically all the time during the day, says he never saw Putzar check off the men, and remembers two occasions when it would have been impossible to have done so. Siverson does not recognize "counting the men" as a necessary part of keeping time, while we submit that "checking off" the men is clearly shown to be connected with time keeping, and this Kinsman never saw Putzar do. Again, to bring the proof down to finer detail:

Putzar's time book and time sheets record the time commencing August 23rd, and on the sheets themselves there is nothing to distinguish August 23rd from any other date. On this day the entries are made in Putzar's handwriting and have all the characteristics of the entries of other days. Of course, in order to keep an independent record of the time in his hand book Putzar's presence on the ship on the day to which the record refers would be absolutely necessary. Curtis, during one of his uncomfortable sessions, while under cross-examination on a subject on which we shall speak later, said: "I do remember that Putzar was there the

first day the boat went over". The following then ensued:

> Q. You think he was there when the work shown on that sheet of August 23d was performed?
> A. To the best of my knowledge, yes.
> Q. What does your knowledge consist of?
> A. You are asking me to remember a whole lot of details about two years back, and I have handled a great many of these sheets in the same manner since then.
>
> (Curtis, V, 1535.)

If the court would read the testimony of this witness immediately connected with the above, found on the same and the following page, we believe that it will have no hesitancy in reaching the conclusion that Curtis knew nothing about the matter of Putzar's presence on the "Hilonian" on August 23rd. Against this doubtful testimony we place the positive testimony of both Kinsman and Capt. Saunders:

> Q. When did Mr. Putzar report for work as a timekeeper on the "Hilonian"?
> A. Sometime on the second day after arriving at the United yards.
> Q. What day would that be? A. The 24th.
> Q. Of what month? A. August, 1909.
>
> (Kinsman, V, 1872.)

> Q. How long were you at the yards of the United Engineering Works on August 23d, 1909?
> A. I spent about an hour and a half or two hours there in the morning and then came back there that afternoon.
> Q. What time in the afternoon?
> A. About half-past 4 or 5 o'clock.
> Q. How long did you stay there then?
> A. About 15 or 20 minutes probably.

Q. Was Mr. Putzar there when you were there in the morning?

A. He was not there at all that day.

Q. Not at all that day. A. Not at all that day.

Q. Do you know when Mr. Putzar first reported for duty as timekeeper?

A. The next day; the next morning.

Q. August 24th? A. August 24th.

Q. Were you there at that time?

A. I was not there when he came. I came there early in the morning and left for the city.

Q. When you were there early in the morning he had not reported? A. He had not reported then.

(Saunders, V, 1772.)

By this time the court is probably wondering what Putzar did if he did not keep time. The record discloses an answer:

David Doig, the foreman of the machine shop, says:

"All day long I had to contend with Mr. Putzar and he chased me all day long *around the shop.*"

(III, 1006.)

It is our suggestion and opinion that Mr. Christy is responsible in part for a situation that developed whereby Putzar gradually worked himself into a position where, though nominally a timekeeper, he was really a self-appointed "adviser" on the job.

A. Mr. Putzar was the adviser of the job, and he kept time on the job. Captain Saunders told me that Mr. Putzar was their adviser on that job, and what Mr. Putzar advised them to do they would do.

(Christy, IV, 1286.)

Christy encouraged this idea of Putzar being an adviser.

Q. You had received orders from Mr. Christy to work under Mr. Putzar's authority?

A. Yes, at that time, yes.

Q. And not under Mr. Klitgard?

A. No, Klitgard had not very much to say in the matter; only Putzar seemed to be the man that we had to go by at that time.

(Taylor, III, 1087.)

A. Well, really the specifications were consulted—when any particular line of work came up that was called for by the specifications, Mr. Klitgaard and Mr. Putzar would be called and their opinion would be asked regarding so and so, in which manner they wanted it done.

(Siverson, IV, 1117.)

In an effort to definitely determine Putzar's position from the viewpoint of one of the men Siverson is asked if Putzar had assumed an authority theretofore held by Klitgaard, and the following appears:

A. Well, that is a very difficult question for me to answer. I do not know whether the man took the authority on himself or whether he was vested with the authority from someone else.

Mr. McClanahan. Q. Mr. Putzar seemed, then, to take on, towards the latter part of the job, the authority which Mr. Klitgard theretofore had assumed.

A. I do not mean to say that Mr. Klitgard resigned his authority, by any means, because Mr. Klitgard did not resign his authority. Nothing was done without Mr. Klitgard's consent, but it appeared as though Mr. Klitgard allowed Mr. Putzar to make suggestions as it were.

Q. Mr. Klitgard allowed Mr. Putzar to assume broader powers than he did at first; is that the idea?

Mr. Frank. He has answered you fully.

A. Yes, sir; that is all right.

Mr. McClanahan. Q. Now, Mr. Siversen—
A. (Intg.) Excuse me; I want to make another statement regarding that. I do not wish to say that it was Mr. Klitgard who done this. I do not know anything about that. I am not supposed to know what was going on between Mr. Klitgard and Mr. Putzar. I am just stating what appeared.
(Siverson, IV, 1105, 1106.)

Here, then, lies the whole matter in a nut shell: Putzar, not being content with merely pursuing the perfunctory role of a timekeeper, undertakes from the very start more active duties. He assisted in testing the crankshaft to determine whether it should come out (VI, 1926), this was certainly not part of his work as a timekeeper, and thereafter he figured prices on work and entered into minor contracts without Klitgaard's knowledge and without authority (VI, 1939, 1940). See also VI, 1941, 1943.

In fact, towards the end of the work, knowing that when the repairs were completed he was going to be Klitgaard's successor and take the boat out as her chief engineer (Matson, V, 1703), Putzar became so busy as an "adviser" that he did not have time to even *copy* the men's time cards, much less keep their time, and so Curtis did it for him. But, of course, Curtis saw to it that Putzar put his signature to these sheets also.

This brings us to a final review and a more detailed consideration of all the irregularities appearing on the time sheets. Of course, Putzar was respondent's timekeeper and not libelant's. The record fails to show

wherein the United Engineering Works had properly the slightest control over him or his work. Matson wanted to keep a check on the job and he wanted to know how near to a proper allowance the credit would be in case the crankshaft did not come out. The final result of Putzar's work was necessarily connected with the result of libelant's work. Properly exercised, the duties of both Putzar and libelant would have worked out in this way: When the job was completed the bill of the United Engineering Works would have been presented, Captain Matson would have received from his timekeeper his report on the time, and the two would have been compared. Counsel seemed not to understand the reason for Putzar's employment.

> Q. What is the good of a timekeeper if you have a specified figure for which the work is to be done?
>
> A. I wanted to know what it was going to cost, anyway. I was satisfied in my mind that the bids were too high, but at the same time I accepted the bid and gave them the job, but I thought I would keep a little tab on them, anyway.
>
> Q. So it was only a matter of curiosity on your part that you put a timekeeper on there?
>
> A. A matter of knowledge, not of curiosity. I would like to know.
>
> Q. When I say "curiosity" I mean the timekeeper was not there for any practical purpose connected with the man you were to put on that particular job?
>
> A. On that particular specification, only the crankshaft.
>
> (Matson, V, 1696, 1697.)

As to the whole job, Capt. Matson entertained the natural desire to know whether his suspicion that he

was being charged too much was justified—as to the non-removal of the crankshaft, he wanted to have some check on the appropriateness of the allowance they were to make, if it did not come out. By no conceivable theory of Putzar's employment was he beholden to any but respondent and the result of his work belonged to no one else. In this view of the matter, the time book, the time sheets and all else connected with his work was the sole property of the respondent. Yet we find libelant in possession of puported duplicate carbon copies of the original sheets, and these copies are introduced against respondent as proof of the value of the labor done on the ship.

Let us, therefore, point out to the court the manifest irregularities appearing on the face of these records, bearing always in mind that libelant's bill for the ship labor is made up from these and nothing else (IV, 1430; V, 1531):

III.

IRREGULARITIES OF PUTZAR'S TIME SHEETS.

(a) *The improper charging of work done on the donkey boiler contract.*

On August 23rd, prior to Putzar's assuming the duty of keeping time, the time book which Putzar turned in as his report several months after the completion of the repairs, shows that 138 hours were worked on the "Hilonian", and that 47 of them represented work on the *donkey boiler*. These 47 hours are improperly charged, for the work on the donkey boiler is chargeable solely to a contract with libelant made November

14th, 1908 (Curtis' Exhibit 6, VII, 2717). Curtis says Putzar knew of all the "Hilonian's" contracts; that he was not keeping time on them, but that he does not remember why he kept this donkey boiler time (V, 1534). We suggest that the reason this particular irregularity appears in Putzar's book is because the time cards covering it were turned over to him by Curtis and he merely copied them. If Putzar was not keeping time on contracts, and he knew all the contracts, then he would not keep time in his "hand book" on donkey boiler work. This class of work appearing in his time book would, if Curtis is to be believed, be convincing evidence that Putzar's work was copy work and nothing more, and the vice of this charge rests upon Curtis who turned over to Putzar the donkey boiler time cards.

> Q. When did you learn of this donkey boiler contract—did you see the contract?
>
> A. I had a list of what was agreed to be done under set figures of the work.
>
> (Curtis, V, 1536.)

On the time sheets introduced under Curtis' direct examination (IV, 1469), we find this donkey boiler work crossed with pencil marks but, although counsel is very careful in having Curtis make detailed explanation of these sheets as proper foundation for their introduction (IV, 1465-1469), no word is elicited from him with respect to this donkey boiler work until the witness is placed under cross-examination, when his attention being called to the sheet of August 23rd, and he is asked if that sheet was incorporated in his bill, he replied: "Not all of it"; and then told of its being

donkey boiler contract work that Putzar would not allow, and that Putzar marked off the sheet (V, 1533, 1534). On being questioned more closely about this marking off of Putzar, we have the following:

Q. When did he do it?
A. At the end of the following day.
Q. That would be the 24th of August?
A. The 24th of August.
Q. Are you sure of that?
A. I am sure of that; yes.
Q. As a matter of fact, Mr. Curtis, don't you know that Mr. Putzar did not go on that job until the 25th or 26th of August?
A. I don't remember whether the 24th or 25th or 26th of August. I do remember that Mr. Putzar was there the first day the boat went over.
Q. You are sure of that, are you? A. Yes.
Q. You think he was there when the work shown on that sheet of August 23d was performed?
A. To the best of my knowledge, yes.
Q. What does your knowledge consist of?
A. You are asking me to remember a whole lot of details about two years back, and I have handled a great many of these sheets in the same manner since then.
Q. Well, now, you don't have to tax your memory for two years on this proposition, do you?
A. No. When you bring up a little detail as to the method, the manner in which these disputes arose, why, I can't give you the exact detail; they come up at the time and I pass them off my mind; I do not carry them around with me.
Q. Do you think the fact as to whether Mr. Putzar was there on the first or second day that work was done on the "Hilonian" is a matter of detail?
Mr. Frank. I object to that. I will have to instruct the witness not to answer all of this class of questions.
Mr. McClanahan. Do you instruct the witness not to answer that question, Mr. Frank?

Mr. Frank. Yes.

Mr. McClanahan. Q. Mr. Curtis, will you answer the question? I am trying to get at your idea of what you mean by detail.

A. Of what?

Q. Of what you mean by detail.

A. By detail—well, I do know that he crossed these off, this time off. Now, I do not know at what time he did it or at what particular moment, I can't remember.

(Curtis, V, 1535-1536.)

The witness said Putzar "*would not allow that time*" (V, 1534), but we say he did allow it if the record of August 23rd is his, and we are proceeding now on the theory that it is. Knowing of the contract, he deliberately kept time on it in his "hand book", Curtis turned over to him the time cards covering it, they were entered in the time book, the time book checked up with the hand book, the duplicate sheets turned over to Curtis o. k'd, vouched for and signed by Putzar as correct, and these in turn rechecked by Curtis with the time cards. When, if ever, did Putzar change his mind on this matter? The record of his work, *turned over to his employer,* shows that he never did (Curtis, V, 1534, 1535). This charge was so glaringly improper that it is a matter of some surprise to us that it was left to Curtis' cross-examination for explanation. We leave the subject without further comment.

(b) *The improper charging of work done on the circulating pump and smokestack contracts.*

As Putzar knew the contracts and was not keeping time on them, and as Curtis recognized that for the time

sheets to contain time on contract work means a double charge to respondent, why, may we ask, did he turn in to Putzar time cards showing work on the circulating pump and on the smokestack, and why did Putzar keep time on these two matters in his hand book? Here are Curtis' explanations of both matters made again on cross-examination:

> Q. Turn to the sheet of August 23d. Do you know what the bilge injection referred to on that sheet is?
>
> A. I cannot tell you at this time, no.
>
> Q. Do you know what the bilge injection is?
>
> A. I know what the bilge injection is, yes.
>
> Q. Is it not connected with the circulating pump?
>
> A. Yes, sir; as a general rule, it is.
>
> Q. Is that a proper charge to be incorporated in schedule No. 1?
>
> A. I could not tell you from the words "bilge injection" just what that man performs at the present time, just what work he did on that bilge injection. I knew at the time, and so did your timekeeper when he checked it up. At the present time, after two years, I cannot remember what were the duties performed in that bilge injection.
>
> Q. Ordinarily, if there was work performed on the bilge injection, it would come under the circulating pump contract, would it not?
>
> A. No, sir; I do not remember as to the extent of that contract.
>
> (Curtis, V, 1563-1564.)

The extent of the contract for this pump was "to supply and install complete and in running order one circulator" (VII, 2715), and no work was done on this pump except that called for by the contract (Klitgaard, VI, 1967). As to the smokestack work, we do not quote Curtis' evidence verbatim because of its length. In

substance he claims that, aside from the agreed price on the smokestack, there was other work done that he cannot remember, but "the timekeeper in charge of the work knew what was being done on the smokestack and he checked the time at that time" (V, 1593-1598). The $900 smokestack contract, shown by Schedule 9 of the libel, provides for the "construction of new smokestack, removing old and installing new" (I, 39). Schedule 9 also contains two other charges, one for $60 for enlarging casing, and one for $180 for making new top for breeching and two new turn buckle hangers. Both of these latter items of charge are clearly for shop work, for the casing must have been enlarged in the shop, and the making of new top for breeching and two new turn buckle hangers must also have been shop work. If these two items are connected with the smokestack, their *installation* was on the ship and, therefore, covered by the $900 contract and there could not properly have been charged any *ship labor* time for them. The trial court discarded the latter item entirely, holding that it was covered by the general contract (VII, 2595). The smokestack agreement was made with Mr. Gray, and Capt. Matson says:

> A. He was to take the old one out and replace it with a new one and do all the work for the $900. (V, 1681.)

On cross-examination, referring to Schedule 9, Capt. Matson says again:

> A. I agreed to that myself, the $900, but I did not agree to the extras.
> Q. You did not agree to the extras? A. No.
> Q. You do not know who did?

A. No, I don't think anybody did, Mr. Frank.
Q. Well, that is your think, Captain.
A. Well, I know.
Q. How do you know?
A. Because nobody could. I made a contract there with him to take that out and put the smokestack in in place and in good order and ready to go to sea and to take no time of the 25 days while she was to be in the dock or in the shipyard.

(Matson, V, 1731.)

Capt. Saunders, who was present when this contract was made, says:

A. There was considerable discussion as to the condition of the smokestack. Finally, Captain Matson asked Mr. Gray for a price.
Q. For what?
A. To remove, make and install a new smokestack. Mr. Gray made a price of $900, which was accepted verbally at that time.

(Saunders, V, 1794.)

As opposed to this testimony, Mr. Gray says:

Q. Now, what was included in that agreement for the smokestack?
A. Just the shell of the stack which was wasted away; it did not even include the bands; we used the old bands and eyes and everything of that kind.
Q. How about the umbrella? A. No umbrella.
Q. When you say "no umbrella", what do you mean?
A. The umbrella is not a part of the stack.
Q. Was not included in that agreement?
A. No, it was not.
Q. At the time that the smokestack agreement was entered into——
A. (Intg.) I did not know there was anything wrong with the umbrella that time.

Q. You did not know that there was anything wrong with the umbrella? A. No.

Q. How about the guys?

* * * * * * *

A. No guys included in the original contract, not with me.

Q. Now, here in Schedule No. 9 of the libel is an item, "enlarge casings"; was that included in the original smokestack agreement?

A. No, not with the arrangement I made; I had nothing to do with that.

Q. What was the reason the casing was enlarged, do you know?

A. Well, I believe they claimed that was the reason that the stack wasted so, because there was not sufficient area around there to let the heat out; I had nothing to do with that casing.

Q. Well, it was not included in your original agreement at all?

A. No. It was very narrow; you could not get at it; you could not get at the stack to paint it properly.

Q. Was the top for the breeching?

A. The breeching is not a part of the stack; it is a part of the breeching.

Q. How about the turn-buckle hangers?

A. No, not any part of the stack.

(Gray, VII, 2350-2352.)

It will be noticed that both the $60 and the $180 items on Schedule 9 purported to be "agreed" to. On this subject we have only the testimony of Klitgaard:

Q. What do you know about that schedule?

A. The smokestack was a contract between Captain Matson and Mr. Gray, made in the presence of Captain Saunders and myself.

* * * * * * *

Q. What do you know about the item in Schedule 9, charged for at $60?

A. I will tell you. When they took the stack out we found the stack badly burned around where the casing was, and came to the conclusion it was because the casing was not large enough; there was not room enough around the umbrella; then Mr. Putzar and Mr. Christy entered into some form of an agreement to renew this casing around the umbrella. While they were still discussing it I came down and objected to it very strenuously on the strength that it belonged to the smokestack contract; we discussed the matter for quite a little while; finally Mr. Christy got angry and he said, "All right, how much is it worth?" I said, "We will give you $60," which was about half of what had been suggested.

Q. You say you contended that that belonged to the smokestack contract? A. Most assuredly.

Q. And you finally agreed to allow $60?

A. Yes, sir.

Q. Why, if it belonged to the smokestack contract?

A. Captain Matson was east and it was near the completion of the vessel. I figured that it was worth more than $60 to the Matson Navigation Company to have the work proceed as rapidly as possible; consequently, rather than dispute the matter I allowed them $60. Captain Saunders was not to be had. He was loading the "Lurline" at that time.

Q. What is your opinion now with reference to that particular item as to whether it belongs to the smokestack contract as originally entered into or not?

* * * * * * *

A. Certainly, it was.

Mr. McClanahan. Q. Certainly, it was what?

A. Part of the smokestack contract.

Q. What have you got to say to the next item of $180?

A. "Made new top for breeching and made 2 new turnbuckle hangers." I am of the opinion that that would apply to the smokestack contract too.

Q. Tell me about the contract, all you know.
A. I don't remember, much about that contract.
Q. Who made it?
A. Mr. Putzar made it with Mr. Williamson and Mr. Hurley.

(Klitgaard, VI, 1942-1945.)

The foregoing is the testimony relative to the smokestack contract. We claim that the $900 covered all the work and, therefore, the $60 and $180 items are improperly charged in Schedule 9 but, even assuming that there were three distinct contracts, as shown by Schedule 9, where is there to be found justification for an additional labor charge such as is shown on Putzar's time sheets?

Q. That time No. 5360, appearing in Putzar's time sheets, was charged against the respondent in this case, and embodied in Schedule 1, was it not?
A. Yes, sir.
Q. And you are also suing in this case for Schedule 9 of the libel, are you not?
A. Yes, sir.

(Curtis, V, 1595.)

The court will bear in mind that we make no contention as to the propriety of the time used on the "letters" placed on the smokestack, shown on pages 48 and 72 of the time sheets, but we do maintain that the 100 hours of labor on the "smokestack", shown at page 42 of the sheets, is a plain duplication for which there is absolutely no excuse. If Curtis, with knowledge of the smokestack agreement embodied in Schedule 9 of the libel, passed these smokestack time cards over to Putzar, and Putzar, with the same knowledge, approved of them as an appropriate charge to

be made against the Matson Navigation Co., in addition to the charges embodied in Schedule 9, then we have nothing to say of such a fraudulent collusion.

(c) *Failure of time sheets to chronologically record the time.*

We will not attempt to point out in Mr. Curtis' testimony the numerous occasions on which he refers to the manner of his handling the ship time cards in conjunction with Mr. Putzar. He checked the cards daily, handed them daily to Putzar and daily received from Putzar the o. k'd time sheets, which the witness daily rechecked with the time cards.

> "Then the cards were demanded each day by Mr. Putzar, and he checked them up with his hand book. I know this to be a fact because I made it my business to ask Putzar each day if the cards were satisfactory * * *."
>
> (IV, 1429-1430.)

> Q. Then when the cards are thus daily checked by you, in the morning they are turned over to Mr. Putzar? A. Yes, sir.
>
> * * * * * * *
>
> Q. But he would always get them on the day following the day on which the work was done?
> A. Yes.
>
> (Curtis, IV, 1498, 1500.)

> Q. And when you checked the time sheets with the time cards, did you find the time sheets to be correct? A. Yes, sir, they were correct.
> Q. You found no error? A. No, sir.
> Q. When is that checking done?
> A. That checking was done each day as soon as all the time cards were in.
>
> (Curtis, IV, 1492.)

A. Mr. Putzar, as a general rule, tore them out every day. I could not say whether he missed a day or two, but I know, as a general rule, he tore them out every day, so far as I can remember.

Q. After having completed the entries in them?

A. Yes. If I did not get possession of the sheet I would ask Mr. Putzar whether the time that I gave him was correct at that time.

Q. So you are willing to testify, are you, that after Mr. Putzar had made the entries in the time book the duplicate sheet was turned over to you, torn out and turned over to you?

A. The duplicate sheets were torn out and turned over to me.

Q. With reference to the time, after he had made the entries in the sheets, or rather after he had made the entries in the book.

A. After he had made the entries in the book he tore out the sheets, yes.

(Curtis, V, 1514.)

This testimony all points to the conclusion that this method of entering and checking time was part of a daily routine program. The time book shows a chronological entry of time from August 23rd to September 14th, inclusive, after which latter date the next entry appearing is under date of September 11th. Then again we find the time of the night of September 15th entered after the night of September 16th. When these irregularities were pointed out to Mr. Curtis (the examiner using the "time sheets") the witness seemed inclined to account for the same on the theory that he, the witness, had gotten the sheets mixed up since Putzar's delivery of them to him (V, 1601-1603). This led to the introduction by respondent of Putzar's original time book, which effectually disposed of Curtis's attempted explanation (V, 1603-1604.)

We submit that this failure of the time book to chronologically record the time, casts a very serious cloud upon the whole of Curtis' testimony relative to Putzar's use of this book in connection with the time cards. It is a situation which demands explanation and, in the absence of any appearing in the record, we offer the suggestion that, as the time of September 11th was not fully recorded in its chronological order, the reason is to be found in the fact that there was an omission to deliver to Putzar all the time cards of that date, and that subsequently this omission was discovered and he forthwith proceeded to enter the omitted cards on the next vacant page of his time book, which happened to be the one immediately following the night of September 16th.

As to the night work entries of September 15th following the entries of September 16th, we offer the same explanation: Curtis forgot to turn over these night cards at the proper time and, therefore, Putzar makes no record of the time until Curtis discovers his mistake.

(d) *Time sheets from September 17th to September 24th in the handwriting of Curtis.*

As bearing on our contention that Putzar graduated from the position of "timekeeper" to that of an "adviser", we call the court's attention to the fact that the time book shows that up to September 17th Putzar recorded the entries in his own handwriting, but from that time to the completion of the book, namely, from September 17th to September 24th, Putzar seems to have abandoned completely his time book, for he made

no further use of it. It was somewhere around the date of this abandonment that Putzar received formal notice of his appointment as chief engineer.

> Q. Mr. Putzar went out with the "Hilonian" as chief engineer, did he not? A. Yes, sir.
> Q. Who appointed him to that position?
> A. I appointed him.
> Q. When was that?
> A. That was probably a week before she went out.
> Q. Under what authority were you acting then?
> A. Under Captain Matson's authority.
>
> (Saunders, V, 1777.)

As we have already shown, after the completion of this repair work Capt. Matson had a hard time getting from Putzar a report of his timekeeping. Saunders importuned him for it, and there was no apparent reason why it should not have been forthcoming as soon as the work was completed. In speaking of this delay, Capt. Matson, on cross-examination, says:

> A. Mr. Frank, a timekeeper, does not have to make a book up two months after the work is all over. If he keeps his time he will have it in the book and he can hand that in right away after the work is finished.
>
> (V, 1708.)

If this time book had been in a presentable condition—if it had been a complete record—Putzar would certainly have brought it forth. It was not complete; Putzar was conscious of the fact that as a timekeeper on that job he had fallen short and, in his trouble, he goes to his friend, Curtis, for help. If he had kept an

independent hand book record of the work from September 17th to September 24th, there would have been no necessity for appealing to Curtis. He could have used his hand book and have soon satisfied his employer's demand for a report. Even had he, at the end of the work, found it impossible, because of lack of time, to complete his time book record from his hand book, would it not have been the proper and appropriate thing for him to have asked assistance from his employer and not from the other side? The daily "settlements" with Curtis had, at this time, ceased to be of any importance, for they were abandoned after September 16th. The work was now completed and his employer wanted a report. If Putzar could have given it, it was his duty to have done so, but he could not and, to explain to his employer why he could not, would have been to have stultified himself, so he puts Saunders off.

Curtis says he did this copying of time from September 17th to 24th on the same day that Putzar asked him to do it (IV, 1469). If this is so, and if we properly assume that Putzar turned over his report as soon as he could, then this copy work of Curtis's must have been done some two months after the job was completed. Some dates may add light to the situation:

The vessel completed her dockage repairs and came off the dock September 16th (Musgrave, IV, 1250); she left the yards of the libelant on September 22nd (Kinsman, V, 1878); she had taken on her cargo on this side of the bay and sailed for Honolulu with Putzar as chief engineer on September 25th (Saunders, V, 1776), and

it was "about two months" after this last date before Putzar turned over to respondent his time book (V, 1777). With his appointment as chief engineer having been made about September 17th, and the boat leaving the yards of libelant September 22nd, and with the attending rush and bustle in the newly repaired engine room on this side of the bay up to the date of sailing on September 25th, it cannot be conceived that Curtis is stating the truth when he explains, on his direct and cross-examinations, why these particular sheets are in his handwriting and not Putzar's (IV, 1468-1469; V, 1523-1525). Curtis admits that Putzar asked him to do this work in *San Francisco,* and it does not take the seventh son of a prophet to read between the lines and come to the conclusion that this request was made two months after the work was done, and for the purpose of satisfying Capt. Matson's demand. We make bold to further assert that when these sheets were transcribed by Curtis, at that time Putzar had not signed them, and never did sign them until after the severance of his connection with the respondent and the institution of this litigation, for it will be seen that, though Curtis's writing on the printed side of these sheets is carbon work, Putzar's signature is original, and such signature does not appear on the pages left in the time book, showing conclusively that the sheets had been transcribed by Curtis and torn out of the book itself without Putzar's signature, and that *afterwards* Putzar signed the sheets left in Curtis's possession.

(e) *Miscellaneous irregularities tending to show that Putzar did not keep an independent record of time.*

(1) The vessel was docked 1 P. M. on September 10th, and yet on that day we find time allowance for work on the "Hilonian's" *"wheel"* as follows:

	Straight Time		Overtime
4 machinists	each 10 hours	and	6 hours
1 machinist	8 hours		
12 riggers	each 10 hours	and	6 hours
1 rigger	7 hours		

and for work on the *"sea valves"* as follows:

	Straight Time		Overtime
1 iron worker	3 hours		
2 machinists	10 hours	and	2 hours
2 machinists' helpers	10 hours	and	3 hours
1 machinist	5 hours	and	2 hours
1 machinist	4 hours		

(Sheets 46-47.)

This shows a total time allowance on wheel work of 175 straight hours and 136 hours of overtime, and on sea valve work of 52 hours straight time and 10 hours overtime.

We contend that as to the wheel work it was impossible, and that as to the sea valve work it was not done and, in support of these contentions, we simply submit the evidence:

> Q. Could any work have been performed on the wheel of the "Hilonian" prior to the ship going on the dock of the Marine railway? A. No, sir.
>
> Q. And you have stated she went in there when—on the Marine railway?

A. On the 10th of September.

Q. Could any work have been performed on the sea-valves before the 10th of September or before she had been placed on the marine railway?

A. It could have been, but it was not.

Q. Would it have been possible to have worked on the sea-valves, or the wheel of the "Hilonian", for 10 hours straight time on September 10th?

A. It would be possible on the sea-valves provided they took the right course.

Q. Was any work for 10 hours straight time performed on the sea-valves on that day? A. No, sir.

Q. What have you got to say about the wheel?

A. That is an impossibility unless there was a diver working on it.

Q. And there was no diver working on it?

A. No.

(Kinsman, V, 1895.)

Q. Do you know when the "Hilonian", Mr. Klitgaard, went on the marine railway of the United Engineering Works? A. September 10th, 1909.

Q. Could any work have been performed on the wheel of the "Hilonian" by machinists prior to the ship going on the marine railway. A. No, sir.

Q. Could any work have been performed on the sea-valves of the 'Hilonian" prior to the ship going on the marine railway?

A. Yes sir; it could have been, but there was not.

Q. Mr. Klitgaard, would it have been possible to have done work on the sea-valves of the "Hilonian", or on her wheel for 10 hours straight time on the 10th of September, 1909?

A. No, sir. She did not go on the dock until one o'clock in the afternoon.

(Klitgaard, VI, 1964.)

It will be considered that item 9 of the original specifications contain this requirement:

> "New wheel to be fitted to the satisfaction of owner's representative."
>
> (Respondent's Exhibit Christy "C", VII, 2656.)

Respondent was to furnish the wheel, but it was to be fitted by libelant to the satisfaction of owner's representative.

The court will now understand libelant's rebuttal evidence:

> Q. He (Klitgaard) is asked: "Could any work have been performed on the wheel of the 'Hilonian' by machinists prior to the ship going on the marine railway," and he says, "No, sir." What explanation have you to make to that, Mr. Gray?
>
> A. Well, the wheel was there two or three days before the ship went on the dock. Naturally you would try your gauge before you put your ship on the dock to see whether the wheel was the right taper.
>
> Q. Where did that wheel come from?
>
> A. It came from the Union.
>
> Q. You say it was brought over to your works before the ship got there?
>
> A. Yes—not before the ship got there, but before the ship went into the dock. By the way, that taper did not fit either.
>
> Q. You say it was brought over there. How was it brought over there, Mr. Gray?
>
> A. It was brought over in a barge.
>
> Q. You said something about the taper not being right. A. The taper was not right; no.
>
> Q. By whom was that wheel made?
>
> A. Made by the Union.
>
> Q. What did you have to do with respect to it?
>
> A. Had *it* file it up by hand so as to fit the gauge.

Q. So as to fit the gauge? A. Yes.

Q. He is also asked: "Could any work have been performed on the sea-valves of the 'Hilonian' prior to the ship going on to the marine railway," and he answers: "Yes, sir, it could have been done, but there was not."

A. Well, that was work that we spoke of a few minutes ago, that extension handle, that was on the main sea-valve.

* * * * * * *

Q. Mr. Klitgaard is asked: "Would it have been possible to have done work on the sea-valves of the 'Hilonian' or on her wheel for 10 hours' straight time on the 10th of September, 1909," and he answers: "No, sir." What, if any, comment have you to make on that?

A. Well, I have answered that, that they were working on the sea-valve, making that extension.

Q. Before she went in to dock?

A. Certainly. The pump was being installed. The pump was installed and these changes were being made as they went along; the wheel was lying there in the barge and naturally the first thing we did was to try the gauge.

(Gray, VII, 2387-2388.)

Q. Was there anything done on the wheel of the vessel before the vessel was put in the dock?

A. Yes, sir, on the barge; while the wheel was laying on the barge coming from the other side of the bay some fitting was done in the hub.

Q. Why was that done?

A. Something was the matter with the keyway.

Q. With the keyway? A. Yes, sir.

Q. Was anything else done to the wheel?

A. Later on it was put on; put on and fitted on the shaft.

Q. Put on and fitted on the shaft? A. Yes, sir.

Q. Was any portion of the wheel cut or chipped off?

* * * * * * *

A. I don't know.
Mr. FRANK. Q. You don't know?
A. No, sir.
(Wilhelmson, VII, 2515, 2516.)

Mr. Gray's reference to an "extension handle" is found in his testimony at page 2383 and, by referring to it, we do not get any light on the subject except perhaps that the inference may be drawn that the extension handle is in some way connected with the ship's sea-valves, and that the work on this extension handle was done in the shop for 10 hours straight time on September 10th.

However the record may stand with reference to the sea-valve work, it is perfectly clear that when Putzar's time sheets show ten hours straight time and six hours of overtime on the "Hilonian's" wheel on September 10th they show an impossibility. The work was done, if at all, on the *new* wheel, and it was done while the wheel was *"laying on the barge coming from the other side of the bay"*. The time cards of the men doing this work were evidently passed into Putzar with all the other *ship* cards and he simply copied them into his record along with the rest.

(2) On September 14th W. Ross, electrician, No. 322, is allowed a total of only 12 hours when he is shown to have worked 7 hours straight time and 4 hours overtime. The total allowance should have been 15 hours, and we cite the matter as bearing on Curtis's testimony touching the thoroughness with which Putzar checked these sheets with his hand book. This error is simply further evidence of our contention that Putzar copied

from the time cards and nothing more. The error was on the time cards and consequently appeared on the time sheets.

(3) On September 15th L. K. Siverson, machinist, No. 508, is allowed on sheet 64 *ten hours straight time* and 4 hours overtime on rudder work, and on sheet 65 is allowed *9 hours straight time* on work on valves.

(4) On September 17th, page 70 of the time sheets, the time of the first 25 men is duplicated on page 73 under job No. 5295. Curtis says the time on the duplicated sheet is incorporated in our bill (V, 1542), but he refuses to recognize that one page is a duplication of the other (V, 1543). The trial court gives the respondent credit for this duplicated time (Decision, VII, 2597), but it failed to take cognizance of the more important matter, namely: that this duplication of time discredits all of Curtis's evidence on which the materiality of these time sheets stand, for it is inconceivable that an error of this magniture could appear in the time cards of the men and also in Putzar's hand book. This duplication shows clearly the worthlessness of Putzar's signature to these sheets, for his signature appears on both sheets 70 and 73 vouching for their correctness.

(5) Sheet 73 showing night work on September 20th is entered before the day work, again showing that there was no attempt to record the time chronologically. Also, on this same date, H. Nelson, No. 325, is shown to have worked *at night* 14 hours overtime (sheet 78), and 10 hours straight time and 4 hours overtime

(sheet 80). This would mean that the man had been allowed 10 hours straight time and 18 hours overtime, or 26½ hours of actual work, *all performed in one night.*

(6) On September 21st (sheet 84) P. McUrney, No. 150, is allowed 10 hours straight time and 8 hours overtime for work on tank top, and 10 hours straight time for work on try cocks. This means that respondent is called upon to pay 20 hours straight time and 8 hours overtime in one day's work. On the same day J. Finson, No. 190, is allowed 4 hours straight time for work on "floors" (sheet 82), 8 hours straight time for work on "tank top" and 10 hours straight time for work on "try cocks" (sheet 84). This gives an allowance to this man of 22 hours straight time work in one day.

On the same day William Eader, No. 212, is allowed 14 hours of straight time (sheet 84).

On August 28th F. Paoli, No. 176, is allowed 18 hours of straight time (sheet 11).

On September 14th W. Schmidt, No. 318, is allowed 42 hours of time composed of 10 hours straight time and 16 hours overtime. Reckoning 8½ hours of actual work as straight time, and adding to this the 16 hours of overtime, gives 24½ hours of actual work in one day. This, of course, would be impossible (sheet 59).

On the same day workmen, *No. 355,* No. 517 and No. 536 are each allowed 10 hours straight time and 15 hours overtime, making a total of 23½ hours of actual work (sheet 59). This seems almost incredible, but there are other similar instances (September 15th, No. 330, No. 515, No. 269, sheet 64; September 20th,

No. 364, sheets 78, 80; September 13th, No. 515, No. 564 and *No. 355,* sheet 55).

On Sunday, *September 12th,* C. Schmidt, *No. 355* (sheet 52), is allowed 34 hours double time, which represented 17 hours of actual work and, as will be seen from the above, this man worked 23½ hours September 13th and 23½ hours on September 14th. This record would seem almost incredible.

On September 20th (sheet 80) H. Nelson, foreman, is allowed 10 hours straight time and 4 hours overtime and on the same day at night (sheet 78) he is allowed 14 hours overtime, the total representing 26½ hours of work in one day.

On September 20th, workman No. 516 is allowed 5 hours straight time on job No. 5398 and 9 hours of straight time on job No. 5295 (sheets 79, 80).

On September 20th workmen No. 375, No. 570, No. 505, No. 567, No. 568 and No. 513 are allowed 10 hours straight time and 3 hours overtime (sheet 81), and in the night on the same day each man is allowed 13 hours overtime (sheet 78). This is 24½ hours of actual work for each man in one day.

(7) On August 28th workmen, whose numbers are 105, 176, 181, 186 and 188, are allowed 50 hours of straight time for work on "ladders" (sheet 11).

On September 2nd two workmen, No. 105 and No. 109, are allowed 8 hours straight time on "ladders" (sheet 25); on September 21st workmen whose numbers are 189, 190, 203 and 205 are allowed 34 hours straight time and 14 hours overtime on work on "floors"

(sheet 82); on September 23rd workman No. 109 is allowed 10 hours straight time on "floor plates" (sheet 86); on September 24th workmmen whose numbers are 106, 184, 181, 127, 114, 186, 109 and 189 are allowed 40 hours of straight time for work on "floors".

All of the above are improperly charged to the respondent for the work is covered by a separate contract (see schedule 5 of libel, 1-37).

(8) Francis Dolan, foreman pattern maker, worked on the ship on August 27th, 28th and 31st, September 1st, 11th, 12th, 13th, 14th, 16th, 17th and 18th (I, 171-172). He kept his own time while there and the time of the men working with him in his department. His cards and the cards of these men were turned in as *shop cards* and have been introduced in evidence as such (I, 172). The point, however, is this: If Putzar was keeping an independent record of work done on the *ship,* he would have had a record of the time worked there by Francis Dolan and his men. However, the name of Francis Dolan does not appear on Putzar's time sheets, and this is but another proof supporting our contention that Putzar simply copied the time cards that Curtis supplied him with.

IV.

ALLOWANCE OF OVERTIME BEFORE STRAIGHT TIME HAS BEEN WORKED.

We have already briefly noticed this matter under another head, and we will, therefore, be as concise as possible in making special reference to it again.

It will be admitted we think that the record shows clearly that a workman is not entitled to overtime until he has worked his full straight time of 8½ hours.

Q. Mr. Adamson, a man does not get overtime until he has worked his full hours of straight time?
A. No, sir.
Q. Unless it is Sunday or a holiday?
A. Unless it is Sunday or a holiday.
Q. He has got to work his full straight hours and then he gets overtime after that?
A. All over his straight day's work is overtime.
Q. My point is, he does not get overtime until he has first worked his straight time?
A. Certainly not.

(Adamson, II, 319.)

Q. Well, in your department, you cannot get overtime until you work straight time?
A. That is correct.

(Dolan, I, 169.)

The rule established by libelant with reference to overtime allowances for ship work is stated by Adamson:

Q. So that if a man works on job 500 nine hours of straight time and then works overtime five hours on the same day for Job No. 600, job No. 600 is charged with the overtime.
A. Charged with all the overtime.
Q. That is the rule of the office?
A. That is the rule in the office.
Q. You know, do you?
A. I know that from my dealings in the office in connection with the time cards.
Q. You are perfectly sure about that?
A. I am perfectly sure above that.
Q. Let us have no misunderstanding.
Mr. Frank. What is the use of all that?

Mr. McClanahan. Q. Where one job consumes all the straight time, and the man on the same day is given another job number and works last on that, the last number is charged with the overtime?

A. The number on which he works overtime is charged with all the overtime.

(II, 320.)

It seems that the same rule was in vogue for ship work:

Q. Are you aware that that time-book has innumerable instances where a man is allowed overtime before he has worked his straight time?

A. It may be.

Q. Are you aware of that?

A. I have noticed where men have been on the night shift that some men have received overtime.

Q. Before they have worked their straight time?

A. They have worked straight time on some other vessel, or some other job, and been called on at night. Unless it is by agreement, if we force that man to work at night they would pay the overtime.

Q. So that when a man works on a ship other than the "Hilonian" his straight time during the day, and is put on the "Hilonian" at night, he is allowed overtime?

A. He would be, and on any other vessel.

Q. And that overtime is charged in this bill to the Matson Navigation Company?

A. If such was the case it is. It would not be so unless somebody ordered it.

(Curtis, V, 1558-1559.)

There are many instances where the time sheets show a man receiving overtime when he has not first worked out his *full* straight time, but we would only call attention to those cases where the men are shown to have received overtime (on days other than Sun-

days and holidays) who have not worked *any* straight time:

Aug. 24. 355, 2½ hrs.; 133, 138, 141, ½ hr. each. (Sheet 2 Day Work.)

Aug. 26. 524, 3½ hrs.; 395, 396, "½ day" each. (Sheet 6, Day Work.)

Aug. 27. 318, 7 hrs. (Sheet 9, Day Work.)

Aug. 30. 100, 1 hr.; 124, 13 hrs.; 127, 8 hrs. (Sheet 15, Day Work.)

Sept. 13. 330, 14 hrs.; 537, 3 hrs.; 564, 15 hrs. (Sheet 55, Day Work.)

Sept. 13. 202, 5 hrs., 206, 5 hrs,; 210, 5 hrs.; 215, 5 hrs.; 401, 1 hr. (Sheet 56, Day Work.)

Sept. 14. 124, 14 hrs.; 330, 8 hrs.; 506, 13 hrs.; 516, 2 hrs.; 536, 2 hrs. (Sheet 59, Day Work.)

Sept. 14. 356, 2 hrs. (Sheet 14, Day Work.)

Sept. 15. 330, 15 hrs.; 333, 4 hrs. (Sheet 64, Day Work.)

Sept. 16. 535, 2 hrs.; 355, 2 hrs.; 500, 5 hrs. (Sheet, 67, Day Work.)

Sept. 16. 512, 2 hrs.; 519, 2 hrs.; 538, 2 hrs.; 332, 3 hrs. (Sheet 68, Day Work.)

Sept. 22. 325, 10 hrs.; 568, 8 hrs. (Sheet 85, Day Work.)

It will be noted that Curtis's excuse for charges of this character is that the man is called upon to work "at night". Unfortunately for Curtis, every one of the above related examples covers day work. If Putzar was keeping an independent record of time, how can it be conceived that allowances of this charac-

ter were made by him? If he was simply copying, the problem becomes easy of solution.

V.

AN ALLOWANCE FOR 10 HOURS WHEN BUT 8½ HOURS WERE WORKED.

This subject too has already been referred to in our discussion of the shop proof and it will not be necessary to enlarge upon it except in one important particular.

Schedule 1 of libelant's bill charges respondent with the use of *"air tools"* on ship work (I, 31). It will be remembered that libelant's excuse for charging 9 and 10 hours for shop and ship work respectively, when by 8½ hours were actually worked, was its agreement with the labor unions, this being the method agreed upon by which the hours constituting a day's labor were decreased without the wage being effected. If by any possibility this court should view favorably this labor charge of unemployed time to respondent, we feel convinced that it will not take the view that libelant is entitled to charge respondent for the use of air tools during this unemployed period. By referring to No. 56 of Putzar's "time sheets" it will be seen that a charge of *55 hours* is made for the use of 5 air tools, 4 of them being operated by men who receive 10 hours each of straight time and 1 being operated by a man who received 10 hours of straight time and 5 hours of overtime. These men actually operated these tools for 47½ hours, and respondent is charged

55 hours for the tools' use. This is not the only instance of this unjustifiable charge, as will be seen by examining Putzar's sheets 9, 15, 16, 18, 19, 22, 27, 32, 40, 42, 48, 60, 61, 63, 66, 68, 70, 71, 75 and 77.

Our criticism of libelant's proof is by no means complete, and even at the risk of tiring the court we will summarize a little further.

On Schedule 1 is a charge for 1145 lbs. of checkered floor plate. This is a part of the contract Schedule 4.

The "Hilonian's" "*reverse shaft*" was never in libelant's shop (V, 1891; VI, 1959), and yet we are charged with shop work on it (Adamson's Exh. 46, Sept. 22).

No "*new valves for feed pump*" were ever furnished to the "Hilonian" (V, 1891; VI, 1960), and yet we are charged with work on the same (Adamson's Exh. 2, Sept. 3).

None of the "Hilonian's" "*bed plates*" were ever in the shop of the libelant (V, 1892; VI, 1960), and yet we are charged with shop work on them (Adamson's Exh. 8, Sept. 9; Id., 17, Sept. 9; Id., 64, Sept. 8).

No work was ever done on the "Hilonian's" "*air chambers*" in the shop of the libelant (V, 1892; VI, 1960), and yet we are charged with shop work on them (Adamson's Exh. 8, Sept. 2; Id., 17, Sept. 2).

No work was ever done on the "Hilonian's" "*oil pump*" (V, 1893; VI, 1961, 1962), and yet we are charged with such work (Adamson's Exh. 10, Sept. 2).

No *"cylinder liner"* work was ever done (V, 1893; VI, 1962), and yet we are charged with such work (Adamson's Ex. 28, Sept. 11).

No work was ever done on the *"cover for slide valve"* (V, 1893; VI, 1962), and yet we are charged with work on it (Adamson's Exh. 37, Sept. 10).

No *"columns"* of the "Hilonian" were ever in libelant's shop (V, 1894; VI, 1963), and yet we are charged with shop work on them (Adamson's Exh. 63, Aug. 23; Ex. 64, Aug. 29).

No *"condensor"* from the "Hilonian" was ever taken to the shop of libelant (V, 1894; VI, 1963; IV, 1150), and yet we are charged with shop work on it (Adamson's Exh. 121, Sept. 10).

No "taps" were ever tempered in the shop of libelant (V, 1894; VI, 1963), and yet we are charged with this character of shop work (Allen's Ex. 66, Sept. 1).

No work on *"tube heads"* was ever done in libelant's shop except under the contract Schedule 10 (V, 1890; VI, 1959), and yet we are charged with such work under No. 5295 (Adamson's Ex. 102, Aug. 30, Aug. 31).

On August 27th (Adamson's Exh. 94) William Schmidt's (No. 318) card charges respondent with *6 hours' overtime* under job No. 5295 "on board Hilonian". The card also shows full *straight time* was worked for No. 5253, which is not a "Hilonian" number. On August 27th this same workman is shown by Putzar's time sheets (Sheet 9) to have worked *7 hours' straight time on the ship* under job No. 5295.

W. B. Thomas (No. 315) worked in the *shop* August 27th on No. 5295 for 9½ hours straight time (Adamson's Ex. 55), and on the *ship* on the same day on the same number 10 hours straight time (Sheet 9). On August 28th the same man's card (Adamson's Ex. 55) shows 10 hours *shop* work charged to No. 5295, while Putzar's time sheets credit him with 10 hours *ship* work on the same job number on the same day, both credits being for *straight* time.

On September 15th John Ross (No. 348) is credited with 1½ hours of straight time *shop* work under No. 5325 (Adamson's Ex. 69) and on the same day he is credited with 10 hours straight and 2 hours overtime on the *ship* (Putzar's sheet 64).

On September 16th James B. Gordon (No. 368) is credited with 8½ hours of straight and 1¾ hours of overtime *shop* work for work on "pump links" under job No. 5398 (Adamson's Ex. 82), and on the same day with 5 hours straight time for *ship* work on the "rudder" under No. 5325 (Putzar's sheet 67).

On August 28th F. Paoli (No. 176), a boy 17 years old at the time (II, 683), is credited by the time sheets with 8 hours of straight time as an ironworker *using an air tool* on "ladders", and on the same day with 10 hours straight time as an ironworker on "ladders" (Putzar's sheet 11).

On September 8th J. Hurley, foreman (No. 101) is credited with 10 hours straight time on "tank top" work under No. 5346, and 5 hours straight time on "smoke stack" work under No. 5360 (Putzar's sheet 42).

On September 20th H. Nelson (No. 325), night foreman (IV, 1185), is credited with 10 hours straight and 4 hours overtime on "stuf box gland", and 14 hours overtime on "drag link brasses", both under No. 5325 (Putzar's sheets 78 and 80).

Schedule 1 charges $720 for running power house at night—480 hours at $1.50. If we allow only 8½ hours for daylight work there will be left 15½ hours for night work as the greatest possible number of hours the power house could have been run in any one day for night work. Therefore, the charge of 480 hours divided by 15½ equals 30.9 days. As Putzar's time sheets only show night work on the ship on 24 days, respondent is overcharged under this item 6.9 days of 15½ hours each at $1.50 per hour. The trial court said that the answer to this contention was to be found in the testimony of Ferro (VII, 2598). We must confess to our inability to understand what part of Ferro's testimony is referred to, and shall leave it to opposing counsel to enlighten this court on that subject (Ferro, IV, 1309-1318; 1322-1328).

The time cards of David Doig, foreman of libelant's machine shop, were all made out by Sjoberg, the timekeeper (III, 1005). David Doig does not vouch for their correctness, Sjoberg is not called to do so, and yet the cards, *in some unaccountable way,* are found to be in the record, and, therefore, *without any proof whatever* respondent is charged with several

hundreds of hours of labor shown by these cards. And it is to be further noted on every card this *shop man* is allowed *10 hours of straight time.* (See David Doig Ex. 1).

The card of John Knight (Knight's Ex. No. 1) was also made out by Sjoberg, the timekeeper, but introduced through the agency of Curtis (IV, 1445).

The cards of O. Haglund, Larson, Vaccarez, Dominick, Noleroth, Smith, J. Perry, Petrocelli and L. Perry are all in evidence on the *sole testimony of Curtis that he knows the handwriting appearing on the respective cards* (Curtis, IV, 1442-1452). Has counsel the temerity to claim that all the hours shown by these cards have been legally proven as part of the quantum meruit value of this work?

Before concluding this part of our brief and taking up respondent's proof and contentions, we wish to say that in this case respondent has not been called upon by libelant to pay what this work was reasonably worth but what it is said to have cost, and, while cost is an element in the value of work and material, it can only be a fair measure of value where it is of a competitive character. That is, an isolated cost is not a fair measure of value, because there is ground for the contention that time may have been unnecessarily lost in the performance of the work or higher prices paid for the material that went into the job than the market price. Even though libelant's proof were free from the irregularities which have been pointed out, we submit it was not the most appropriate evi-

dence so long as it lay within libelant's power to produce better. Both Christy and Gray were skilled men in their line, they had intimate knowledge of what the work was and how it had been done, and we submit were fully qualified to have testified as to the reasonable value of the work without basing their testimony on its cost to them.

Respondent's Proof and Contentions.

As we have said in the opening of this brief, respondent contends that there was a contract originally entered into for the doing of work in accordance with certain written specifications, and that, although there were, by mutual consent, departures from the specifications in certain particulars, the contract price still remains the measure of value. We shall proceed then to show that there was such a contract, the extent to which changes were made in it, and finally the extent of the extra work for which libelant is entitled to its quantum meruit remuneration. The argument will be pursued in the following order:

I. The contract.

II. The changes:

(a) The substituted methods of performing certain items of the specification work, and the compensation work for omitted specification work.

III. The non-removal of the crank-shaft.

IV. Proof of value of all repairs.

V. Costs.

I.

THE CONTRACT.

Even to opposing counsel it must be clear that respondent's burden in proving a contract is fully met if it be shown that, at the time of the vessel's delivery to libelant on August 23rd, there had been an acceptance of libelant's bid of August 2nd reading:

> San Francisco, Cal., August 2, 1909.
> Sub.—Repairs—"Hilonian".
> Matson Navigation Co.,
> Gentlemen,—
>
> We hereby respectfully submit a figure of Eleven Thousand Seven Hundred Forty-nine ($11,749.00) Dollars on the repairs to the above steamer, all to be in strict accordance with the specifications and further we guarantee to finish the work therein specified in twenty-five (25) Calendar days from the date of delivery of vessel at our yard.
>
> Respectfully submitted,
> United Engineering Works.
> Per H. P. Gray, Sect.
>
> [In pencil]: This bid submitted on acc of it being worth $250.00 to have vessel at U. E. Wks. to complete work already contracted for in the shape of retubing Donkey Boiler & retubing Howden System etc. Per Capt. Saunders.
>
> (VII, 2653.)

(We have omitted the formal printed part of the letterhead.)

And, if the bid *was accepted*, it must be equally clear that the contract thereby formed could not have been destroyed without the consent of both parties. There

can be no question about respondent's testimony showing the acceptance of the offer of August 2nd, for it is clear cut and all one way.

Capt. Matson testifies as follows:

Q. What was the first conversation with Mr. Gray, about the bid of August 2d?

A. Well, he wanted the job awful bad, because he said that he had several small contracts on the ship, and he wanted the ship over at the yard. I felt that the bids were still higher than they should be, and he suggested to me that we put a timekeeper on and he would guarantee that he would do the job within that figure, and if the crankshaft did not have to come out there would be a reduction of a couple of thousand dollars.

Q. What was the result of the conversation?

A. I told him I would give him the job and accept his bid.

* * * * * * *

Q. Do you remember about what you said to him when he first came into the office on that occasion?

A. I told him I would accept his bid.

Q. What was the conversation that followed the statement of yours that you would accept his bid?

A. He said that he would be glad to take the job and do it within the limit of that amount of money.

(Matson, V, 1666-1667.)

Q. Do you remember the date of the acceptance of this bid?

A. It was somewhere near about the 17th or 18th of August. I do not remember exactly.

Q. Subsequently, after this conversation, in which you accepted the bid of the United Engineering Works, state whether or not the "Hilonian" was turned over to the United Engineering Works.

A. She was turned over to them shortly after the acceptance of the bid.

Q. For what purpose was she turned over?

A. To fulfill that specification.

Q. To fulfill the accepted bid?

A. Yes, sir.

(Id., V, 1669-1670.)

Capt. Saunders testifies as follows:

Q. Do you know whether Mr. Gray had any conversation with reference to their second bid, with Captain Matson?

A. He had a conversation at the time he accepted the bid.

Q. When who accepted the bid?

A. When Captain Matson accepted the bid.

Q. When was that?

A. That was after the arrival of the steamer in August—about the 18th of August, 1909.

Q. Where was that conversation?

A. In Captain Matson's private office.

Q. Who was present?

A. Captain Matson, Mr. Gray and myself.

Q. Do you know how Mr. Gray happened to be there?

A. Captain Matson told me to telephone to him.

Q. Did you do so?

A. Yes, sir.

Q. And it was in response to this telephone message that he came?

A. Yes, sir.

Q. Will you please now state what was the conversation that took place at that time.

A. When Mr. Gray came in the Captain said, "Well, Gray, I have decided to give you the job although I still think the bid is too high, but I want an understanding with you that if the crank-shaft does not have to come out of the ship we will get an allowance from the bid. I am going to put on a timekeeper, as you suggested, for the purpose of

getting that reduction". That is about all of the conversation, except that Mr. Gray said, "Thank you". I think that is about all.

(Saunders, V, 1766-1768.)

Q. After that conversation which you have just related, did you between that time and the time that the "Hilonian" was sent to the yard of the United Engineering Works, have any conversation with Mr. Gray?

A Several.

Q. With reference to what?

A. The time that she was to be at the yard.

Q. Who had charge of the matter of that time?

A. I was in charge of that. It depended on how soon we could get rid of the cargo entirely.

Q. How does it happen that in your specifications which I have marked your "Exhibit No. 1", the time is there explicitly stated to be August 23d as the date from which the time limit on the bid is to run?

A. That is the time that we figured we could have her at their yard, for the work to begin.

Q. Prior to the ship going to the yard had Mr. Gray been informed by you of when she would be put there?

A. Yes, sir.

Q. And what was that date?

A. August 23d.

(Id., V, 1768.)

Q. As a matter of fact, I understand that the "Hilonian" was sent to the yards of the United Engineering Works on August 23d. Why was she sent there?

A. To have this work performed.

Q. What work do you refer to?

A. That work called for in the specifications.

(Id., V, 1770.)

Q. State whether or not any preparations had been made to receive the "Hilonian" at the yards of the United Engineering Works on Monday morning, August 23d, 1909.

A. They had the berth ready and were waiting for her.

Q. Do you know after her arrival how soon work was commenced?

A. Immediately.

Q. In what way?

A. The stripping of the engine.

Q. Had any work under these specifications been commenced by the United Engineering Works prior to the "Hilonian's" arival at the yards?

A. Yes, sir, they commenced work that morning before she left our wharf.

Q. Do you know that?

A. I know that.

Q. What was the character of the work that they commenced?

A. Stripping railings and so forth; any parts that they could get adrift to facilitate the work.

Q. Where did the workmen from the United Engineering Works board the "Hilonian" prior to the "Hilonian" proceeding to the yard of the United Engineering Works?

A. At our wharf at that time.

Q. What wharf was that?

A. Pier No. 10, Howard street.

(Id., V, 1771.)

Engineer Klitgaard testifies as follows:

Q. Were you present when the second bids were opened?

A. No, sir. I came up after they were opened.

Q. How did you happen to come up?

A. Captain Saunders telephoned for me. We were receiving oil at that time and I could not get away just at the time he telephoned.

Q. When you reached the office did you see anyone connected with the United Engineering Works there?

A. I met Harry Gray just as he was going out.

Q. Going out of what?

A. Out of the office.

Q. Did you have any conversation with him?

A. I asked him about how business was, or something like that. He said he had got the work.

Q. What work?

A. I think his words were "We have got the job".

Q. Did you know what he referred to?

A. Surely.

Q. What was it?

A. There was only one job in question, the specifications.

Q. What was the job?

A. The contract job.

Q. The contract on the "Hilonian"?

A. Yes, sir.

Q. After that did you have any conversation with Mr. Gray about the work and prior to the ship's going to the yards?

A. Yes, sir, several discussions.

Q. What were they about?

A. About the work in general and what time the ship would be delivered at the yards; what I considered would be necessary to put the ship in seaworthy condition again, etc.

Q. Do you know when the ship was taken to the yards?

A. Yes, sir.

Q. When?

A. August 23d, 1909.

Q. What time of the day, forenoon or afternoon?

A. She left the dock about half-past 7 on Monday morning.

Q. Which dock?

A. The Matson dock.

Q. On this side of the bay?

A. Yes sir; she would get over to the United Engineering Works about 9 o'clock.

Q. Prior to leaving the dock on this side of the bay were any of the employees of the United Engineering Works on the ship?

A. Yes.

Q. What were they doing there?

A. There were some working on the donkey boiler, and some of them were working on the contract job down below.

Q. You mean by the contract job what?

A. The contract specifications.

Q. The specifications that you have been testifying to?

A. Yes, sir.

Q. The specifications that were let to the United Engineerig Works?

A. Yes, sir.

(Klitgaard, VI, 1920-1922.)

We submit that this evidence standing alone establishes the most material point of the controversy for, if an *acceptance* be shown, then there has been taken the first step in the complete destruction of libelant's quantum meruit case. Gray, the only other party present at the meeting referred to, where Capt. Matson accepted libelant's bid, is called in rebuttal and testified at length as to scores of minor matters, but is asked *not a single* question that would call for a direct contradiction of Matson's and Saunders' testimony on this point of the *acceptance* of the bid of August 2nd. Here is Gray's testimony:

Q. Now, at the time these bids were put in did you have any conversation with Captain Matson?

* * * * * * *

A. I certainly had conversations with him. Do you want me to detail it?

Q. I will come to it. Did you ever, during any of the times that you had those conversations make any suggestion to Captain Matson that if the crankshaft did not have to come out of the vessel you would make a reduction on your bid of a couple of thousand dollars?

A. No, I did not.

Q. Did you make any suggestion of a similar nature?

A. No, sir.

Q. What, if anything, was said between you and him respecting putting a timekeeper on the job?

A. That had been talked over for three months preceding the time the job was let.

(Gray, VII, 2345-2346.)

Q. Now, with respect to the specifications that were given to you for the performance of this work, did you ever see any more than one set of specifications?

A. That is all I know anything about one set of specifications.

(Id., VII, 2349.)

Q. How about being advised about the opening of the bids?

A. The engineer told me when the bids would be opened.

(Id., VII, 2350.)

This, we submit, is every word of the witness's testimony on *direct examination* in any way bearing on the acceptance question, and Gray was the only one who could have contradicted Matson and Saunders if their evidence had been untrue.

Let us now see the confused and contradictory position taken by this witness on this point when it is left to the cross-examiner to bring it out:

Q. Now, your bid of $11,749, as embodied in "Christy Exhibit B" included the removal of the crank-shaft in accordance with the original specifications, did it not?

A. Yes, oh, yes.

Q. What was the understanding about this undetermined matter of the taking of the crank-shaft out?

A. Well, there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be.

Q. And if there was a saving the Matson people would get the credit for it?

A. Most assuredly they would have got the credit for it; that is what they put the timekeeper on the job for.

(Gray, VII, 2405-2406.)

Q. Now, is that your writing, Mr. Gray, upon here (pointing)?

A. No, that is not my writing.

Q. I refer to the following: "This bid submitted on account of its being worth $250 to have vessel and U. E. Works to complete work already contracted for in the shape of retubing donkey-boiler and retubing Howden system, etc., per Capt. Saunders."

A. No, that is not my writing.

Q. But it was in accordance with your idea at the time, was it not?

A. I told Saunders that—yes, that was the reason that we cut our figure.

Q. Cut your figure from the former bid?

A. Because I had quite a bit of work on there. I had that pump to install and all these jobs that were mentioned here.

Q. And it was your desire to have the ship over there and it was worth $250 in your judgment?

A. It was worth $250 to get it over there. It would have cost me that, or probably more to have done it in some competitor's yard.

Q. Was that your reason for coming down in your bid?

A. That is the reason I cut the figure.

Q. You remember the meeting in Captain Matson's office when the bid submitted by you and the Risdon and the Union was rejected, do you not?

A. It was rejected.

Q. You were there, were you not?

A. Whether he rejected that positively at that time, or not, I could not tell you.

Q. Don't you remember that you waited and had a private talk with Captain Matson after the other two men from the Risdon and Union had left?

A. Well, I remember he took exception to the price at that time, and said he thought it was too high.

Q. And don't you remember—

A. (Intg.) That is where it rested.

Q. And don't you remember at that time this timekeeper was suggested to keep track of the work so that you could find out what the reduction would be?

A. It was generally understood there was going to be a timekeeper on the job, after he had come to the conclusion that they were not going to let it out on a contract—that was understood.

Q. It was understood?

A. After it was understood that they were not going to put it out on a contract we all understood at that time, we knew there was going to be a timekeeper on the job.

Q. After who understood it was not going to be let out on a contract?

A. After I and Matson and all of them; they came to that decision; they were not going to let it out on contract.

Q. Do you mean to say that this bid of August 2d, being Christy Exhibit "B" was not accepted by the Matson Navigation Company?

A. He did not accept it. That is the reason he sent the timekeeper over there.

Q. Answer the question directly—that bid was not accepted?

A. No, he did not accept it.

Q. He did not accept it?

A. He did not accept it.

Q. You are not confusing your statement with your first bid which is embodied in the Christy Exhibit "A" of July 27th?

A. He didn't accept that either.

Q. He didn't accept either of them?

A. No.

Q. Will you please now, Mr. Gray, tell me the circumstances under which that bid was rejected, the last bid, Christy Exhibit "B"?

A. Matson made the statement that he was dissatisfied with the price and thought it should be done for less money.

Q. That is what Captain Matson said?

A. That is what he told me, and he said he was going to send a timekeeper to the yards to get the benefit of whatever saving he could get on the job.

Q. Saving on what job?

A. Below this price; he claimed that that price was too high.

Q. Did you say that you would do it for that money?

A. Did I say I would do it for that money? If they stuck to the specifications, certainly.

Q. And he said that he would not pay you that price?

A. His idea was that it was too much.

Q. I want to know what he said.

A. He did not say he would not pay it.

Q. What did he say?

A. He said he was dissatisfied with it, he felt it was too high, and he was going to send a timekeeper to the yard to keep track of the time on the job.

Q. And it was to be a time and material job?

A. Time and material job under those conditions. I told him, I said, "if those specifications are adhered to I will see that it don't cost any more than $11,749".

Q. In other words, that was an outside price?
A. A limiting price.
Q. It should not cost more than that?
A. Not any more than that.
Q. So, then, you and he did have a contract by which this work was to be done in strict accordance with the specifications not to exceed $11,749?
* * * * * * *
A. Well, I told you what I said. I don't know as I have anything more to say regarding it.
Q. Read the question to the witness again.
(Last question again repeated by the reporter.)
A. Providing they stuck to the specifications.
Q. Your answer is yes?
A. Yes.
Q. And the work was to be done in 25 days, was it not?
Mr. FRANK. Well, the contract speaks for itself.
A. 25 days, yes.
Mr. MCCLANAHAN. Q. Who was present when that agreement was finally reached?
A. Captain Matson, myself—
Q. (Intg.) Captain Saunders was there, was he not?
A. You could not prove it by me; I don't know.
Q. You don't remember?
A. I was doing my business with Captain Matson.
Q. You don't remember whether Captain Saunders was there?
A. No.
Q. Do you remember whether Klitgaard was there or not?
A. I could not tell you that.
Q. Don't you remember when you came out of the door of Captain Matson's office that you met Klitgaard and told him that you had got the job?
A. Why should that make any impression on my mind? That was merely a matter of detail. The question here was, did I get the work; that was all I had in my mind. What I told Klitgaard

afterwards, how should that make enough impression on my mind to last for a number of years?

Q. Well, Mr. Gray, you don't remember it then?

A. I don't remember.

* * * * * * *

Q. Mr. Gray, after this agreement didn't you have a good deal to do with Captain Saunders with reference to the delivery of the ship, the time of the delivery?

A. Well, the understanding was we were to get the ship within a given time. That was kept in view at all times.

Q. I say that was the understanding between you and Captain Saunders, was it not?

A. The understanding was—there was Captain Saunders and Captain Matson and Klitgaard and Putzar, they all understood it.

Q. Well, don't bring Mr. Putzar in because he has not appeared upon the scene yet. I am speaking now, Mr. Grey, of the time immediately following the agreement between you and Captain Matson. Did you and Saunders not then confer as to when the ship would be delivered to the works? You remember that he had charge of the discharging of the "Hilonian"?

A. The time she was going to the shop, you mean?

* * * * * * *

I thought you meant the time of the delivery of ship to them.

Q. No, the time she was delivered to you for the work?

A. The understanding was the ship was to get over there as soon as she could. I sent men to this side of the bay to start the job, to get it going.

Q. I see. So some of your men got on the boat on this side of the bay?

A. Yes.

* * * * * * *

Q. And when she finally arrived at your shops, you were prepared to receive her and commence the work?

A. Yes.

Mr. FRANK. I would like to ask you, Mr. McClanahan, what this is all rebuttal of. It is all matter that has been testified to and nobody has disputed it, and you are going over and over it again, and you have been charging me all the time with filling up the record, but you are a masterhand at doing it yourself.

(Gray, VII, 2406-2413.)

Q. Now, Mr. Gray, we are not to take you as occupying the attitude that has heretofore been occupied in this case by your associates, that there was no contract in this matter. You made a contract, did you not?

* * * * * * *

A. Well, I have answered that two or three times. It seems to me that I proposed to do a certain amount of work for a given sum, and Matson would not accept it, and he said he would put a timekeeper on and see if he could not save himself some money; it seems to me that answers it. What more of an answer can you have?

Q. Then, Mr. Gray, you do maintain that you made no contract with Captain Matson?

A. That is not for me to judge. I cannot see where I come in on judging whether it was a contract or not.

Q. Aren't you the man that goes around and gets work under contract?

A. Certainly.

Q. Can't you tell whether you made a contract with Matson or not?

A. He turned it down.

Q. Then you take the position that you made no contract?

A. He turned the contract down.

Q. You take the position, then, that there was no contract with Captain Matson?

After instructions from counsel not to answer the question:

A. Then I refuse to answer it.

(Gray, VII, 2423-2425.)

Q. You have spoken in your cross-examination of extras; what do you mean by that expression?

A. Work that was not in this original list or departure from this list in any way; that would be an extra.

Q. What would be the balance as distinguished from extras, in your opinion?

A. What would be the balance of this? That would be as per list of work or as per contract, if you want to put it that way—if you want to.

(Id., VII, 2438-2439.)

After an adjournment over night counsel resumes redirect examination of the witness and, referring to the cross-examination supra (VII, 2405-2406), says:

Now, in that examination, I now ask you whether or not you were referring to a saving on the crank-shaft or a saving generally upon the entire job.

* * * * * * *

A. Why, the saving on the entire job, as I have explained several times.

Q. Was there any agreement or understanding that the timekeeper should be put on the job to ascertain what, if any, saving there would be if the crank-shaft did not have to come out in order that they might have credit for that?

* * * * * * *

A. The timekeeper was keeping time on the job as a whole; whatever additions there were to be made to it, to the crank-shaft, or subtracted, he was supposed to keep track of those the same as the rest of the job or the same as any other item, if it was added to it or taken from it.

Mr. Frank. Q. Well, I am asking you now what the understanding was, whether or not at the time you and Mr. Matson came together there was any agreement or understanding between you that the work should be done for this $11,750, with the understanding that if the crank-shaft did not have to come out, that a deduction should be made——

* * * * * * *

Mr. Frank. Q. (contg.) For the crank-shaft, if it did not have to come out?

A. There was no bearing put on the crank-shaft at that time any more than anything else.

Q. Then this examination which I have referred to was intended to be in the same line as your subsequent testimony to the effect that he was dissatisfied with the amount of the entire contract and put a timekeeper on to see if he could make any saving out of the $11,749 generally. Is that right?

* * * * * * *

A. That is correct. That is what was said about the matter. It seems to me it was repetition of what I have said before.

Mr. Frank. Q. I say, is that what you mean when you said in the answer: "Well, there was a timekeeper sent to the yards to look out for the job as a whole"?

A. That is exactly what I had in mind.

(Gray, VII, 2482-2483.)

On recross examination we find the following:

Mr. McClanahan. Q. Mr. Gray, do you wish us to understand that you and Captain Matson had an agreement in regard to Mr. Putzar?

A. That Captain Matson and I had an agreement?

Q. Yes.

* * * * * * *

A. He said he was going to send him to the yard as a timekeeper.

Q. That is not an answer to my question.

A. That is the only agreement I know anything about.

Q. You did not have any agreement with Captain Matson?

A. No further than that; that is all.

* * * * * * *

Mr. McClanahan. Q. He simply told you he was going to have a timekeeper on the job.

A. He was going to send a timekeeper to the yard.

Q. Is that all he told you?

A. That is all.

Q. Nothing else?

A. Nothing else.

(Id., VII, 2489-2490.)

The testimony of *Mr. Christy* on this point of a contract is evasive in the extreme. He says that when the "Hilonian" first came to the yards he knew she was to be *docked* because of discussions previously had with respondent's representatives. When asked if these discussions had not led to the entering into of a contract he replies: "Not to my knowledge" (IV, 1233). He is then asked point blank if the "Hilonian" did not come to his yard *under a contract* to do certain repair work, and the effort of counsel to secure from this shifting and elusive witness a positive answer to this question, and to a correlative one as to whether respondent had accepted the bid of August 2nd (with opposing counsel's objections interposed), consumes fully fourteen pages of the record (IV, 1233-1247). Sifted to its final analysis, the witness's sole knowledge of the entire transaction is limited to a no greater understanding of it than that which might well have been possessed by

one of his ordinary workmen. In fact, foreman Siverson knew more about it than Christy, for he says: *"I heard rumors"* that the work being done under the specifications was a contract (IV, 1117). In one breath Christy says: "In this particular case" he did not receive the original or a copy of the specifications (IV, 1266), and in another: "I received a list of work to be performed on the 'Hilonian' " (IV, 1267). He says that *lists* of work to be performed on a vessel are turned over to the foreman (IV, 1262-1263), but he cannot tell whether Christy's Ex. "C" (VII, 1654) is the original or a copy of such lists for the "Hilonian" work (IV, 1267).

Siverson, however, is handed a copy of the specification work (Siverson Ex. "A", VII, 2658) and he says: "It looks like" the specifications he had (IV, 1108) and, when asked if he worked according to the specifications in the particulars where the specifications were carried out, he says:

> A. Well, really the specifications were consulted —when any particular line of work came up that was called for by the specifications, Mr. Klitgaard and Mr. Putzar would be called and their opinion would be asked regarding so and so, in which manner they wanted it done.
>
> (Siverson, IV, 1117.)

Kinsman says he saw similar copies of the specification work to the one he had in the hands of both Siverson and Wilhelmson (V, 1844), and Klitgaard testifies to the same effect (VI, 1919).

Referring again to Christy's evidence: He says that he had heard *"rumors on the waterfront"* that the "Hilonian" was seeking bids, but he heard nothing about it from his partners and never had discussed it with them (IV, 1277). There are many matters in Christy's evidence that deserve criticism, but we will content ourselves with pointing out but two of them that bear on the credit to be given his testimony.

He is asked if he ever discused with *any one* the question of the removal of the "Hilonian's" crank-shaft and he answers: "No, sir." He then qualifies the answer by saying that: "We had a list of work. If that was in the list of work, I probably discussed the job with the foreman at the time the orders were entered, but other than that, no" (IV, 1277). On this material point the witness is directly contradicted by four other witnesses in the case. Captain Matson, in referring to discussions with members of the United Engineering Works relative to the crank-shaft prior to the letting of the contract, says: "Christy went out on the bay one day when the ship came in to look at it, and I think he thought it was all right" (V, 1667). Captain Saunders says that for several months there had been talk about the crank-shaft being out of shape (V, 1757); that he had talked with Christy about the question of the removal of the crank-shaft, and that Christy went aboard the "Hilonian" with him the latter part of June to "try and form an opinion about the crank-shaft" (V. 1765). Kinsman says he was in the engine room of the "Hilonian" when Christy came there:

A. He asked me if I thought the crank-shaft was sprung or bent. His questions seemed to point to the crank-shaft particularly.

Q. Tell us the whole of the conversation. What was done and said?

A. Well, I don't remember the exact conversation, but when he asked me whether or not I thought it was sprung I told him no. He asked me for my reasons and I gave them to him.

Q. What else did he say?

A. That is the only thing that I remember.

(Kinsman, V, 1839.)

And finally Gray adds his impeaching evidence:

Q. Now, you remember Mr. Christy was brought into that discussion, do you not?

A. Yes.

Q. Do you remember (his) going out to make an examination?

A. I was out of town at that time; he told me of it afterwards when I came in.

Q. That he had gone out and made an examination personally himself?

A. Yes.

(Gray, VII, 2403-2404.)

Again: On his redirect examination, Christy says that the "Hilonian" was held on the *dock* "while they (respondent's representatives) were *discussing the advisability*" of making certain repairs to the rudder, the necessity for which had only been discovered after the docking of the ship (IV, 1229-1230). In his testimony on cross examination he states that this discussion and indecision over the newly discovered rudder work extended for "*several days*" (IV, 1291, 1295). The clear inference from this evidence is that there was an added

and unnecessary dockage charge against the respondent *caused by the indecision and delay of its representatives.*

In contradiction on this material point, Captain Saunders says that the question of doing this work was *never* held in abeyance (V, 1779); that the ship was docked at 1 P. M. September 10th (Id., 1778), and the work was commenced the first thing on the morning of the 11th (Id., 1779-1780). In confirmation of Captain Saunders, W. H. Stewart, a Lloyd's surveyor (V, 1780), who accompanied Saunders on the morning of the 11th to the vessel, testified, after refreshing his memory from a memorandum made by him at the time, that "There was work being gone on with on the rudder" (V, 1791). Klitgaard testified that the necessity for this work was discovered shortly after the vessel came out of the water; that Wilhelmson was instructed to go on with the work a couple of hours after the vessel was on the dock; that the work was commenced the first thing the next morning and was carried on without interruption until its completion (VI, 1965). Furthermore Putzar's time sheets show the work of *riggers* and *machinists* on *rudder* and *stern bearings* throughout September 11th, a kind of work appearing on these sheets for the first time.

These two matters of delinquency in Christy's testimony are both important and we know will be given due weight, but, in order to *fully* appreciate the witness, his entire evidence should be read.

Returning now to the direct matter of the contract, we wish to refer the court to several other significant

facts. It will be remembered that the original list of work or specifications was given job No. 5295 (IV, 1322). Klitgaard, in testifying to certain changes in item 4 of the original specifications says that these changes were agreed to be made *in recompense* for work which was agreed to be omitted from that item, *except* that it was agreed that certain challenge metal was to be allowed as an extra.

> A. The agreement was that we were to allow them the price of the challenge metal that was put on these shoes.
>
> Q. In addition to the contract?
>
> A. In addition to the contract.
>
> (Klitgaard, VI, 1931.)

Curtis, in explaining why only 608 lbs. of challenge metal was charged in Schedule 1 of the bill, when Chandler had testified that over 1¼ tons had gone into the ship, says that certain changes had been made at the time and certain work had been started under "No. 5395" (5295), and then *an agreement* had been entered into and a figure agreed to for certain metal and material.

> Q. That is, there was a figure agreed upon for the challenge metal to be used on job 5295?
>
> A. On part of it.
>
> Q. And you were enabled to deduct from the total amount of challenge metal used on the whole job the amount of challenge metal for which there was no agreement?
>
> A. Yes, because we did it at the time it was being done, the work was being done and the pieces were in the shop.
>
> Q. And that extra challenge metal was 608 pounds?

A. That was charged to the "Hilonian."

Q. And the balance of the challenge metal came under an agreement?

A. An agreement, yes.

(Curtis, V, 1609.)

This evidence of Curtis is not very clear, but we submit that between the lines it is easy to see evidence of a recognition of a contract to do certain work under job No. 5295.

Again: Siverson, long before he ever saw the specifications and before the "Hilonian" came to the yards, was given to understand and knew it was going to be a *"rush job"*. (IV, 1110-1111.) Christy says they took nearly everybody in the yard and put them on the "Hilonian".

A. So as to rush the job, get the ship out; there was a great presure to get the ship out and turned over.

(IV, 1287.)

Gray says that it meant much to the respondent to get the ship out in a hurry, and the reason for his bid of August 2nd cutting the specification time limit from twenty-six to twenty-five days was because he thought he "might get an extra stand in with Captain Matson by cutting a day off of this". (VII, 2420.)

All this talk of rushing the job comes from libelant (Siverson III, 1089-1090) and the reason is apparent: It was under a contract to do the work within a time limit. Had it been a time and material job as claimed, we submit that the *"rushing"* testimony would also have come from respondent. If it was a time and

material job and no contract, *why should libelant worry* about hurrying it along? The evidence of Siverson's about its being a rush job may have been offered as an apology for the size of libelant's bill, but, we submit, that in the absence of any evidence from the respondent of its being a rush job, except the time limit of the specifications it rather tends to prove libelant's desire to fulfill its contractual obligation to finish the work in twenty-five days.

Again: After libelant had presented its bill, respondent requested that it be *segregated* (V, 1836), that is, that the original specifications or list of work be separated from the extras or additions, and this, Curtis says, "*we*" attempted to do but failed (Curtis, V, 1549-1550). His failure, we submit, is to be attributed solely to the method he pursued in the attempt,—he says he went to the men and asked them "if they remembered the exact detail that they did or performed". "We didn't pay any atention to the time cards that I can remember". * * * "The time cards didn't contain all the details." * * * "I don't remember whether they were all destroyed or not,—some parts there were—I don't remember whether there were or not" (V, 1550-1551). And yet the time cards were the very means by which "objections" and "doubts" respecting libelant's bills were always settled.

> A. The cards in all cases are kept for a certain period. After that, if we do not hear any objection we destroy them, but if we hear that the parties concerned have any doubt as to any of the charges on the bill we keep the card pertaining to that item or to that class of work.
>
> (IV, 1431.)

Referring to a time when the work was in progress, Curtis says that when the foreman stated to him that numerous changes were being made to the original list of work numbered 5295, and that new numbers were being used to cover these changes, he explained to them that *"that was under my orders"*. He then, *"in order to simplify"* the situation, instructed the foreman of every department "to use the numbers on the job *collectively* and to note on their sheets the work as they actually performed it" (IV, 1463). The result of the *noting* made in conformity with these instructions was afterwards consolidated by Curtis into the *heading* for Schedule 1 (IV, 1428; see Schedule 1, 1-15-22). The fact that libelant at the request of respondent undertook to undo this mixup, for which Curtis was responsible, is indicative of a recognition by it of the truth of respondent's contention that there was a contract,—that there was something to be segregated.

Again: The original specifications called for the painting of the ship, *but the paint was to be furnished by the respondent.* Libelant's bill contains no charge for paint and the inference follows that, in conformity with the contract, the paint was furnished by respondent.

The contention made by libelant that there was no contract seems to find its sole incentive from the fact that there was a time keeper on the job.

> Q. Why is it that you consider that you had no contract on that job?
>
> A. *Well, the Matson Navigation Company must have so considered it themselves;* they had a timekeeper at our yard keeping the time of the men.

Q. I am not asking——

A. (Contg.) —in the beginning, and if it was a contract job why should you keep the time?

Q. I am not asking for the attitude of the Matson Navigation Company. I am asking you for your attitude. Why do you consider that you had no contract?

A. I drew my conclusion from that.

Q. From the fact that they had——

A. (Intg.) They had a timekeeper of their own, and they kept the time of every man working on the job.

Q. That is the reason you conclude that there was no contract?

A. Yes. You have asked me that question right now, that is why I answer you.

Q. Not because there was no acceptance of this offer of August 2?

A. I know of no acceptance of it. I know of no contract, and I know also they had a timekeeper there, so that led me to believe that it was not a contract.

(Christy, IV, 1284-1285.)

We believe the court understands clearly the reason a timekeeper was employed.

We trust the court will be lenient in its criticism of us for embodying in this brief so much of the printed record. Our only excuse is that we have done so in order that the court may have before it all the direct testimony bearing on this important point. No argument is necessary and we leave the matter confident of the court's decision.

II.

THE CHANGES.

The Substituted Methods of Performing Certain Items of the Specification Work and the Compensation Work for Omitted Specification Work.

If we have shown a contract the record fails to disclose any evidence of its destruction by the consent of both parties; therefore, the only remaining question is: How was it affected, as matter of law, through the changes made? Respondent contends that all these changes were made by mutual consent, and that the contract still remains. Klitgaard testifies on the subject of changes in the original specifications as follows:

Item 1.

The *enlargement* of studs on the air pump joint to condenser was not done, but instead, to answer the same purpose, *additional* studs were put in. This substitution was made at the request of the libelant and with the consent of both parties (VI, 1928).

Item 2.

This work was not found necessary but, in recompense for its omission, it was agreed that a 12-inch balance piston was to be fitted on top of the low pressure valve, piped to the condenser, the valve stems lengthened and such other necessary work done to fit the new conditions. This agreement was entered into with the sanction and approval of Captain Matson and Mr. Gray, and was also known to Captain Saunders,

Wilhelmson and Klitgaard (VI, 1928-1930; Saunders, V, 1781-1782, 1811).

Item 3.

This work was all done as specified (VI, 1930).

Item 4.

Instead of putting in the extra screw stays called for by the item, heavier, plates were put on the back of the guides. Instead of *reconstructing* the H. P. and L. P. shoes, new shoes were made, with the agreement that respondent should pay as an extra for the challenge metal to go into the new shoes. This agreement was made by Klitgaard with Wilhelmson in Putzar's presence, and Gray being told of it subsequently said: "Oh, that is all right" (VI, 1930-1932).

Item 5.

The remetalling and refitting of the H. P. and L. P. eccentric straps called for was not done, but in recompense these straps were taken to the shop and two brass liners, pocketed and filled with challenge metal, were cast and fitted to them and the whole returned to the ship and fitted to the sheaves. The L. P. eccentric straps were also trued up. The figuring before this was agreed to was done by Wilhelmson and Putzar, and Klitgaard figured it later and agreed to allow as an extra 300 lbs. of bronze so as to make the change a fair one. After the work had been started Klitgaard explained it to Gray, who "kicked" so much about it that Klitgaard agreed to allow as a further extra

certain challenge metal, and Gray said: "All right, let it go at that" (VI, 1934).

Item 6.

This work was all done as specified (VI, 1935).

Item 7.

Instead of the iron column called for a bronze patch was used to accomplish the same purpose. Mr. Gray suggested the change and Wilhelmson, Putzer, Saunders and Klitgaard all took part in the agreement, which was that it was to be an equal exchange provided the bronze did not weigh over 900 lbs. If it did, the excess was to be paid for as an extra. It subsequently was found to weigh 898 lbs. (VI, 1935-1936; Saunders, V, 1783).

Item 8.

This work was all done as specified (VI, 1936).

Item 9.

This work was performed in accordance with the specifications except the crankshaft was not removed (VI, 1936; Siverson, IV, 1114).

Items 10, 11, 12 and 13.

The work called for by all of these items was done according to the specifications (VI, 1936, 1937).

Item 14.

It was not found necessary to repair the windlass and, as a recompense, two channel iron supports were

put in the brake of the forecastle head. Wilhelmson did some figuring on this change and made the agreement with Klitgaard that one should balance the other (VI, 1937-1938; Saunders, V, 1784. See also Taylor, IV, 1134).

Item 15.

This work was all done as called for by the specifications (VI, 1938).

The foregoing is respondent's proof of the changes. In rebuttal libelant called Wilhelmson, who testified as follows:

Item 2. (In rebuttal of Saunders):

> A. Well, I was entertained of the proposition by Mr. Klitgaard, but I cannot have any voice, but I have no voice in that matter; this is the specification and it is up to the firm to change anything. The mechanical end is what I was there for to attend to, and not any arrangement why or wherefore.
>
> Q. Well, did you agree to it? A. No.
>
> (VII, 2502.)

(In rebuttal of Klitgaard):

> A. He (Klitgaard) approached me on the subject at that time, but I referred it over to Mr. Gray, and he may eventually say that, as said there, he would leave it up to me.
>
> Q. The question is, was any such thing done in your presence? A. No.
>
> (VII, 2504.)

Item 7. (In rebuttal of both Klitgaard and Saunders):

> A. Yes, they understand all that very well, but I never heard anything like that in my pres-

ence. The only thing in my presence was the virtue of the patch or column as a mechanical end, and that is all.

(VII, 2505.)

Item 5. (In rebuttal of Klitgaard):

Did you make any agreement with Mr. Klitgaard that that work should be compensation for Specification No. 5? A. No.

Q. Or did you make any agreement with him that it should be recompense for Specification 5, except that they were to allow you 300 pounds of bronze?

A. I made no such agreement. I don't know of the deal.

Q. What?

A. I never heard of the deal, in my presence.

(VII, 2512.)

Item 4. (In rebuttal of Klitgaard):

Did you ever make any such agreement with Mr. Klitgaard?

A. No, not to my recollection.

Q. Well, you mean by that you simply have no recollection of it, or do you mean that you did not make the agreement?

A. Well, they asked often absurd things; that does not say that I would be willing to entertain it in fact. This item is simply absurd, on account of the new castings, and labor involved, and as for allowance on it, I never made any.

Q. Well, did you make any agreement with him at all respecting it? A. No.

(VII, 2513.)

And then follows a general denial of his having consented to any changes:

Q. I will ask you generally, Mr. Wilhelmson, did you ever make any agreement with Mr. Klit-

gaard or Mr. Saunders respecting any of the items of the specifications being changed and other work being done instead of those items in lieu of or as compensation for the work omitted.

A. I made no agreement, but I was often asked to make concessions, but I had continually to refer it to the firm. I have no right to change.

Q. Well, you say you have no right to change. Did you make any, or consent to any of them being done?

A. No. I said previously. I made no changes, although often I was asked to make such concessions, I referred such matters as that to the firm, Mr. Gray especially; the absurdness of some questions would also not allow me to entertain a thought upon some of them.

(VII, 2513-2514.)

The foregoing is the substance of all of Wilhelmson's direct rebuttal evidence on the specification changes, and we submit that it is weak. The witness was still in the employ of the libelant at the time of testifying (III, 1014). Six months previously he had testified on libelant's main case (III, 1009), and on redirect examination *then* we find the following on the subject of changes in the specifications:

Q. But you do not know now what changes were made in those specifications?

* * * * * * *

A. To the best of my ability and memory there were changes, but it is utterly impossible for me to remember all the changes. You ought to know that. You will allow that, and any such change had to be passed by an authority and given a job number before I could ever act on it.

* * * * * * *

Q. What the cause or reason or nature of the changes are, you have no knowledge of?

A. No, sir, and I must always see that the proper man in authority makes the changes, sometimes to avoid mistakes and things like that, and see that the numbers are right.

Recross Examination.

Mr. McClanahan. Q. So that though you have not any remembrance now of the changes themselves made in the original specifications for the "Hilonian" work, you know that when they were made they were made with authority, and you passed on them?

A. Yes, sir.

(III, 1018-1019.)

On his cross-examination in rebuttal it appears that two or three days before testifying he had talked with counsel, Curtis and Gray (VII, 2517). With reference to his memory being clearer then than when he had testified six months previous, he says: "Every day it becomes far more distant" (VII, 2518). He then says that when he was called to give rebuttal evidence he did not know that he was going to be questioned on the subject of changes in the specification work, and that his talk with counsel, Gray and Curtis did not have any reference to that subject, and that his testimony in direct rebuttal was the result of a *scratching up* process (VII, 2522).

Gray, on his cross-examination in rebuttal, after admitting that he had talked with Wilhelmson, says:

Q. Have you talked with him with reference to compensation, this swap work?

A. Yes.

Q. He is going to testify, is he, on that subject?
A. I don't know. You have got me; I am not running the case.

(VII, 2431.)

The court will find Wilhelmson's further testimony on cross-examination on the subject of the change in Item 2 very interesting (VII, 2524-2531), and the important fact is disclosed that Gray told him to *go ahead* and put in a balance cylinder (VII, 2530). His cross-examination on Item 7 is also interesting (VII, 2531-2534), and here again the important fact is disclosed that Gray told the witness to *go ahead* with the change and put on the patch (VII, 2534). The witness then gives general testimony as to the changes that were made and clearly states that no change was ever made *without the consent of either Gray or Christy,* and that all changes had *Klitgaard's consent also* (VII, 2535-2538).

Q. And in every case where there was a change made from these specifications, you were told to go ahead with that change, either by Christy or Gray?
A. I got notification from the office.
Q. Yes, to go ahead with that work?
A. Yes, sir.

(VII, 2538. See also Taylor, IV, 1138.)

Siverson also testifies to the same effect:

Q. That is, if it was a contract job there would be no changes in that without authority from your superior? A. No, sir.
Q. And in each case where there were changes from the specifications you say that Putzar and

Klitgaard acquiesced in the change? They agreed to them?

Mr. FRANK. He did not say that.

A. As far as I can remember.

(Siverson, IV, 1174.)

Mr. Gray's rebuttal evidence on the subject of specification changes on direct examination is complete,—he denies everything, only admitting that Klitgaard "tried to get me to" make changes (VII, 2357-2362). On cross-examination he admits that "Klitgaard was always trying to swap one thing for another"; that Wilhelmson came to him with two or three propositions and he was told "it was impossible, it could not be done" (VII, 2431); that Wilhelmson came to him with the swap of the "balance cylinder" and he "told him, no"; that that was the last he heard of Klitgaard's proposition of the balance cylinder; that Wilhelmson had no power to change any contract (VII, 2432); that Klitgaard undoubtedly spoken to him about it; that the reason he declined to make the swap was because the substituted work was of greater value, and that there would have been more profit in the balance cylinder (VII, 2435). We then find this interesting evidence:

Q. Why did you decline to make a greater profit by a larger work if the whole job was a time and material job?

A. I did not refuse to put in the cylinder for him. He could have the cylinder or anything else he wanted on the ship; but he tried, his proposition was to take in place of the work on the valve as specified—he had a list of work for doing this other job, one offsetting the other.

(VII, 2436.)

Here Mr. Gray was cornered and, we submit, did not get out very gracefully (VII, 2435-2437). For him to say "I did not refuse" was in direct contradiction of all his previous evidence as well as the evidence of Wilhelmson. To curtail the examination of the witness on the subject of these changes and relieve him from further embarrassment he was asked:

> Q. And this testimony that you have given with reference to the balance-cylinder would apply, would it not, Mr. Gray, to all of Mr. Klitgaard's requests for exchanging the work?
>
> A. Oh, yes, the same thing right straight through; yes.
>
> (VII, 2437.)

There is much to be found in the testimony of libelant's witnesses about *changes* in the work but, we submit, that the only changes were those made in the specifications which have been referred to. That there were *extras,* and many of them, new work not contemplated or discovered except as the job progressed, we admit. If Siverson, Wilhelmson or any of the other workmen, having the original specifications in hand and not knowing that they were covered by a contract, were being constantly called upon to do work (extras) outside of the specifications, of course, they would refer to such new work as a change, and these constant so-called changes were said to have been the cause of unnecessary loss of time. Siverson, not knowing that there was a contarct for the spring bearing work, is led by counsel to fall into error in just the way suggested:

> A. Well, there would be, for instance, such cases as it was decided that a certain piece of work was

> not to be done. To cite an instance: it was originally when the spring bearings were first removed that only two should be remetalled. Those two were removed to the shop to be remetalled, the remaining three were cleaned up, scraped and scraped and dressed up in the usual manner with oil grooves cut, placed aside ready to be replaced when the shaft and conditions required that it should be replaced. After these bearings were examined, however, and Mr. Putzar and Mr. Klitgard were called into consultation, it was decided that they would have to be remetalled also, so they were removed to the shop and remetalled as well, and the work of cleaning and dressing them, cutting new oil grooves and putting them aside was of course all unnecessary.
>
> (III, 1901.)

Unfortunately for Siverson's illustration, if there was any unnecesary time or labor lost in the remetalling of these five spring bearings it was libelant's fault and not respondent's, for, unknown to Siverson, the work was the subject of a contract made between Gray and Klitgaard (VI, 1939). See also Siverson's statement as to changes in gratings and ladders, the contract covered by schedule 5 of the libel (III, 1098-1099). But we are digressing somewhat.

As further evidence that these changes were compensation work and intended to be carried out without affecting the contract, we point to the fact that to this substituted work was given the original contract specification number, 5295. (See Francis Dolan's time cards: Aug. 30, "Hilonian patch on condenser"; Aug. 31, "Patch on condenser"; Sept. "Patch on condenser"; Sept. 4, "Patch for condenser"; Sept. 10, "Balance cyl. Hilon-

ian''; Sept. 11, ''Balance cyl.'' Reichhold's Cards (Dolan): Aug. 30, ''Patch for Hilonian''; Aug. 31, ''Patch for Hilonian''; Sept. 1, ''Patch Hilonian''; Sept. 8, ''L. P. balance cyl. for Hilonian''; Sept. 10, ''L. P. bal. cyl. str. Hilonian''; Sept. 11, ''L. P. bal. cyl. for Hilonian''; Aug. 27, ''Patch for condenser & bed plate''.)

The instances, such as above, are too numerous to fully record and they extend to the material cards as well as to the time cards.

Q. Do you know, Mr. Curtis, that that balance cylinder work was given on the time-cards job number 5295?

A. If it is on the time-cards, I believe it was; yes.

(Curtis, V, 1627.)

Q. So that on this list of numbers 5295 appeared and under the specification of work to be done on that was a patch on the condenser? A. Yes, sir.

(Nelson, IV, 1197.)

Mr. McClanahan. Q. Mr. Adamson, when a job comes into the United Engineering Works' hands it is given a job number, is it not?

A. Yes, sir.

Q. That job number passes into your department, does it not? A. Yes, sir.

Q. For that particular work? A. Yes, sir.

Q. And it remains the job number of that particular work until completion?

A. Until completion.

Q. That is correct, is it? A. Yes, sir.

(Adamson, I, 280-281.)

Q. Are extras given different numbers from contract jobs? A. Yes.

(Dolan, I, 173.)

In libelant's view this was not compensation or substituted work, but work performed outside the list or substituted work as an extra. Why was it not then given a separate number?

If the situation was such that the changes in the original specifications, together with the extra work which was found, made it impracticable for libelant to keep specification work separate from the extras, it was a situation brought about by the ill-advised if not deliberate act of Curtis in ordering the job numbers to be used *"collectively"* (IV, 1463), which was but one way of ordering the work to be mixed up. That this was an unusual method of handling the job is shown from the fact that it was reported by Curtis to Mr. Eva, the president of the libelant company, *and received his approval* (IV, 1463). That the "changes" referred to by Curtis were nothing other than extras or work in addition to the specifications, and that such work could have been handled under separate job numbers, and could have been followed independently of the contract work, is perfectly clear from the record. Adamson says:

> A. There would be so much ordered, and the first order number would be given, and then the officials of the ship would probably change their minds, which they often do, and would then order something else to be done in connection with the same ship which had not been mentioned in the same number.
>
> Q. So you would give a separate number for that other work? A. Yes, sir.
>
> Q. In order to keep track of the work?

A. In order to keep track of it and to charge the work.

* * * * * * *

Q. That is an easy way to do it, is it not, it is a practical way to do it, is it not?

* * * * * * *

A. Well, it works out practically in our work—that is all I know, so far as the machine-shop is concerned.

(II, 310-311.)

Kinsman says:

Q. Mr. Kinsman, you are familiar, are you not, with the work done on the "Hilonian" other than which was covered by the specifications, and the specifications as modified? A. Yes, sir.

Q. What we may call extra work? A. Yes, sir.

Q. Would there have been any difficulty in keeping track of this extra work performed on this job in the way of time and material?

A. I don't think so.

(V, 1875-1876.)

Mr. Klitgaard's testimony on the point is even more comprehensive and specific, for he says that there should have been no difficulty in keeping track of the labor and material done on the *minor contracts* separate from the original specification work, the *extras* separate from both minor contracts and the specification work, and then specializes as to the circulating pump contract and the Howden force draught work along the same lines (VI, 1966).

As a matter of fact from libelant's standpoint it did keep separate the work of the several *admitted* contracts from the balance, and had no trouble in doing so.

Curtis furthermore, while the work was in progress on Schedule 4 under the original #5295, had no difficulty in segregating such work after he had been informed of its being contract work (IV, 1435). These are practical demonstrations of the feasibility of doing what we contend could have been done if libelant had been so minded. In addition to this our experts, Gardner and Heynemann, give their testimony as to the feasibility of the proposition (Heynemann, VI, 2054-2055; Gardner, VI, 2278).

III.

THE NON-REMOVAL OF THE CRANK-SHAFT.

The object of discussing this matter under a separate heading is to show clearly that before and at the time of entering into a contract both parties understood that the question of the shaft's removal was undetermined, and that, in case it should be decided not to remove it, then the original contract price should be appropriately reduced by the amount of the saving. We have already referred to much of the testimony which bears on this subject.

Although Klitgaard had "contested very strongly right along" (VI, 1918) that the shaft was all right and need not be removed to the shop, yet he inserted the requirement in the specification calling for its removal:

> A. Because Mr. Gray had so impressed Captain Matson with the idea that the shaft was defective

that Captain Matson thought it would be safest to call for its removal.

(VI, 1918.)

The repairs to the vessel had been under discussion between Klitgaard and Gray for some time before the specifications were finally submitted, and "the possibility of the crank shaft having to be lifted was talked of", and Gray at the request of Capt. Matson had made a separate trip down to the boat to look at it (Gray, VII, 2400-2401). With reference to the "Hilonian's" needs, Gray had discussed with Klitgaard what was necessary to be done, and when the specifications reached his hands they were in accord with such discussions (VII, 2402-2403). Gray is then asked what his opinion about the crank shaft was:

A. Well, I believed that the crank-shaft would have to come out and go to the shop; that is my opinion of it. It had a decided athwarthship motion all the way from a thirty-second to possibly a sixteenth.

Q. Did Mr. Klitgaard coincide with you in that?

A. No, I don't think he did. I think he was averse to that.

(Gray, VII, 2403.)

(See also Saunders, V, 1805.)

This evidence clearly establishes the fact that the requirement for the removal of the shaft to the shop, as called for by Item 9 of the specifications, is to be traced directly to Mr. Gray.

At the time of and immediately preceding the letting of the work this was the situation which confronted

Capt. Matson touching this very important item of the proposed repairs: His chief engineer was of the decided opinion that the shaft's removal was unnecessary, and Capt. Matson hoped that he was right (V, 1806), while Gray was of the opinion that it was necessary and libelant's offer covered its removal as called for by the specifications. The question is: Was this indecision and uncertainty left in the air on the acceptance of libelant's bid or was the contract let with an understanding that covered the matter? Capt. Matson and Saunders both say that it was not left undetermined, but that the contract was let with the proviso that, if the shaft was not removed, then there was to be an appropriate deduction from the $11,749.00 and, in order to ascertain what such deduction would be, a timekeeper was put on the job. Gray affirms this agreement absolutely:

> Q. What was the understanding about this undetermined matter of the taking of the crank-shaft out?
>
> A. Well, there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be.
>
> Q. And if there was a saving the Matson people would get the credit for it?
>
> A. Most assuredly they would have got the credit for it; that is what they put the timekeeper on the job for.
>
> (Gray, VII, 2405-2406.)

This then was the agreement on which the contract was made, namely: That the question of the shaft's removal was to be held in abeyance until it was tested

and, if such test showed no necessity for its removal, then respondent was to be credited with the resulting saving. Capt. Saunders, representing Capt. Matson, followed closely this work of testing the shaft for "Captain Matson was very anxious to know whether it was necessary to take it out or not" (Saunders, V, 1808), and it "was the main topic of conversation up to the time that it was found unnecessary (Id., V, 1809), and after the test had been made Capt. Saunders says it was the first thing he reported to Capt. Matson (Id., 1781).

We believe that the court will now have no difficulty in reaching its determination of the point just discussed, and this brings us to our concluding argument on the question of our proof as to value.

IV.

PROOF OF VALUE OF ALL REPAIRS.

When, through the exigencies of this suit, respondent was forced to a consideration of the question of making proof of the value of libelant's repair work, its dominating motive in approaching the matter was to secure such experts as would be fair and impartial and, when chosen, to give them every assistance within its power in their work of investigation. With this in view its choice fell upon two men: Fred A. Gardner and Lionel Heynemann, both practical marine engineers and repair men of large experience. Mr. Heynemann's services were secured despite his declaration that he "rather

sympathized with the U. E. Wks. and had found Matson very arbitrary'' (Libelant's Ex Heynemann #3, p. 1). On his cross-examination we find this:

> Q. Mr. Heynemann, you said something on your direct examination about the arbitrary nature of Captain Matson. Have you had a hand in other disputes in which he has been engaged?
>
> * * * * * * *
>
> A. In reference to the statement that you refer to I would like to bring it out that when I was asked to serve on this case I did say that my sympathies were more to the United Engineering Works than they were with the Matson Navigation Company, and my principal reason for so stating was that I was more of a shopman, and had more sympathy with the shops, and with the men that were managing the United Engineering Works than I had with the steamship company.
>
> (VI, 2183-2184.)

On his redirect examination, when asked if his statement made in cross-examination (quoted supra) was all of the conversation that preceded his engagement by respondent, he replies:

> A. I remember that I told you besides mentioning that I was in sympathy with the United Engineering Works and with the managers whom I considered friends, that I was much more of a shopman than I was a man to be selected by the owners. In fact, I used the expression that I was the wrong man for your side, that you had better get somebody else.
>
> Q. Did you or did you not have in mind at that time your former connection with the Matson Navigation Company with reference to the ''Rosencrans''?
>
> A. I also had that matter in mind at the time, and I will further state that so far as I remember

you said, "We want you anyhow," and then I made the remark, "If after my statement to you you still want me, I am then willing to serve."

(VI-2194.)

We submit that Mr. Heynemann's selection under these circumstances was as fair a one to the libelant as could possibly be made, and in the choice of this man from among a score or more of other available experts respondent was but carrying out its original determination to avoid any suspicion of attempting to secure a biased opinion. Mr. Heynemann's qualification as an expert is to be found on pages 2013 to 2018 (Vol. VI) of the record as well as on his cross-examination found at pages 2166 to 2172 of the same volume.

We shall await with interest counsel's criticism of Mr. Gardner who is not catechized on this subject of qualification. Our opinion is that Gardner stands at the head of his profession on this coast in the line of work for which his services were secured, and this opinion is borne out, we submit, by the record as to his qualifications (see VI, 2201-2204; Id. 2219-2225). If counsel differs from our opinion we shall not be averse to his stating it *even though it may have no foundation in the record,* and may differ from that of his client who says of Gardner: "He is a very skilled man; no question about that" (Gray, VII, 2475).

These experts were given a copy of the original specifications and a copy of Schedules 1 to 10 as set out in the libel. They were then asked to go over the itemized work as shown in libelant's first cause of action and ascertain and segregate:

1. The work shown there as covered by the original specification;

2. The work covered by other contracts;

3. The unprovided for balance,

and then give their estimate on this "unprovided for balance" which would cover the extras, and the value of the omitted work, which would cover the non-removal of the crank-shaft (VII, 2683).

Their answer to the work set forth as above is summarized in their letter to respondent of April 29th, 1910 (VII, 2604). They allowed Schedules 2 and 3 amounting to $937.07; they deducted from Schedule 4 the charge of $146.88 on the ground that it is covered by Item 9 of the original specifications, and also $25.00 of the $50.00 charge for grinding off the piston rod on the ground that it was not ground off but turned; they deducted from Schedule 9 the $60.00 and $180.00 charges on the ground that they are covered by the $900.00 smokestack contract. With these deductions they allowed all of Schedules 4 to 10 amounting to $3,890.00.

For the extra work, which they segregated from the contract work, they allowed $6,280.50, and besides this made an arbitrary allowance of $2,000.00 for bonus and overtime on this extra work. These several amounts, when added to the original contract of $11,749.00 equal $23,919.00 and from this total respondent's experts deduct the sum of $1,398.25, being the saving resulting from the non-removal of the crank-shaft, and in addition give to respondent a credit allowance for scrap of $535.76, making a total allowance of $1,934.01, and leav-

ing a balance as their estimate of the value of the whole repair bill, including the schedule contracts, of $22,922.56.

Before entering upon a discussion of the work done by these two experts and their manner of doing it, we would remind the court of respondent's position in this matter. It had received from libelant a bill which, on its face, made no reference to the contract,—the contract might have been there but it was not visible, and as Capt. Matson says: "It was easy to find fault with a bill that was rendered for $34,000 as against $11,749" (V, 1721). Gray too adds his testimony to the situation:

> A. Well, there was a vast difference between a $2,000 bill and a $30,000 or $40,000 bill, and the way this was piling up, it was getting to be a pretty serious proposition, running into a great deal of money, and while there might not be any feeling toward one or two thousand dollar bills, when you get around to four or five times that, it is a vast amount of difference.
>
> Q. When you first saw this bill, Mr. Gray, you were really surprised yourself at the size of it, were you not—not imputing to you any doubt as to its correctness, you were surprised that it had run so high?
>
> A. Well, I had hoped that it would not run as high as that.
>
> (VII, 2467.)

Even in Gray's opinion respondent's "feeling" on getting this bill must have been a natural one. On its face it was utterly at variance with the situation as known to respondent, and this variance was such as

could not possibly be understood by it, nor had it at this time any inkling that libelant was attempting to avoid its contract. Under these circumstances the appropriate course was to ask libelant to make the matter clear by segregating the items of Schedule 1 so that the contract work and extras might be apparent. The request was made and, we submit, it was libelant's duty to have complied with it. That it failed to do so, and that the burden of performing for libelant that which it was libelant's plain duty to perform, makes it apparent that it does not lie with libelant to criticize respondent's methods, if those methods were the best open to it. It does not behoove libelant to complain if, with better facilities because of a more intimate knowledge of the work, its failure has put upon respondent this duty to perform. Respondent undertakes performance in the only possible way. It secures the best agencies known to it and renders such agencies every assistance in its power, and yet libelant complains and explains. It *complains* because of our choice of experts, and *explains* that their undertaking was not feasible. In other words, although responsible for a situation, the wrong of which is of its own deliberate making, libelant says to respondent not only do we object to your method of attempting to undo this wrong, but we assert that at this late date it cannot be undone by any method which you may see fit to employ; therefore, you will have to submit to it. We do not believe that under the circumstances, libelant's criticism of respondent's proof of value will find favor with this court.

In their work on Schedule 1 the experts segregated the enumerated work into 140 items corresponding to respondent's Ex. Kinsman #2 (VII, 2643-2652), and in their examination this exhibit is used,—the items 1 to 140 being passed upon separately by each witness, and, for the purpose of making clear the character of the examination on each of the 140 items, we will present here Mr. Heynemann's direct testimony on the *first item* of the list reading:

"Renew #4 tank top on port side and secure fore and aft and thwart ship angle irons under same."

A. No. 1; most of that work I saw. The angle-irons under the tank-top could not be seen.

* * * * * * *

A. No, sir; I saw the tank-top, not the work, but I saw actually the tank-top.

* * * * * * *

A. I saw the tank-top, but could not see the support under the tank-top. At the same time the rivet work shows on the tank-top itself showing very well what work was done below the tank-top.

Q. You know the construction underneath the tank-top? A. Yes, sir.

Q. Will you please state what you did with reference to an inspection, if anything, on the tank-top, and the work performed?

A. We went on board the ship, looked at it, measured it up, counted the number of plates, made a little sketch of it and went through the work as if we had to estimate on it ourselves. I would like to correct my statement to this extent, that while the rivets on the top show the location of the top supports, of course they would not show the location of the botttom angle-irons that are affixed to the skin of the ship.

Q. Will you state now what was the result of your inspection of the tank-tops with reference to the extent of the work.

A. The work of renewing the tank-tops was limited to the plates that could be seen in No. 4 tank, with the exception of the first plate forward of the after bulkhead of No. 4 tank, and the first plate aft of the forward bulkhead, and besides, the plates in the shaftalley were not renewed.

Q. That is, on the portside of No. 4 tank?

A. On the port side of the No. 4 tank.

Q. State whether or not the margin-plates were renewed in that tank.

A. The margin-plates were not renewed.

Q. Does that belong to any one of the items of the specifications? A. No, sir, it does not.

Q. How was it figured on by you and Mr. Gardner? As an extra? A. Yes, sir.

(VI, 2027-2029.)

The questions and answers of both witnesses cover the matter of their having seen or not seen the particular item of repair work, whether it belonged to any of the items of the original specifications or was compensation work, or whether it belonged to any of the contracts covered by Schedules 4 to 10 or was figured on as an extra. Their method of figuring this work is described by each. Heynemann says on cross-examination, in explanation of why he had retained no details of his figuring:

A. Because the way we made up this estimate will probably explain it to you why we could not really preserve the details; Mr. Gardner and myself went over the ship together and made sketches and took sizes, and then we met generally in the evening in his office, and we would go through item by item, and he would figure up one item and I

would figure up the same item, and then we would agree on a compromise figure between us two; sometimes I would be higher and sometimes he would be; and in that way we simply enumerated opposite the item No. 1 our figure; so in that way the bid was itemized.

(VI, 2058.)

Mr. Gardner adds his testimony as follows:

Q. How did you do the actual figuring? When I say "you," I refer to you and Mr. Heynemann.

A. I hardly know how to answer that other than we pursued the method that I think is quite usual in regard to estimates of that description. We took an item and arrived at an estimate of the cost by setting down the details on scratch-paper or something of that kind, the length of time that was consumed in one class of labor and the amount of material that was supplied.

Q. Did you do that separately, or did you do it together?

A. I made a complete estimate separately, and Mr. Heynemann made another estimate. Then we went over the items in detail, that is, the items individually, not each item in detail necessarily except where we found there was some little discrepancy in our figures, and then we questioned each other as to whether we had allowed for this, that or the other, that might possibly have escaped one man's attention. Then we made our corrections accordingly as to an agreed figure arrived at between the two figures found on that item.

(VI, 2214.)

They made an allowance, in the matter of time necessary to complete the extra work, in excess of their judgment as to what would be necessary (Gardner, VI, 2332-2333), and in addition allowed $2,000 as an arbitrary amount for overtime (Id., 2276; Heynemann, VI,

2050), although Heynemann says the extras might not have required any extra time: "It would depend on when the orders were given, but we thought we wanted to be very liberal, and we therefore allowed what we considered a very large item in the matter of overtime; and we to-day do not know, perhaps whether we are not allowing more overtime than is really claimed" (VI, 2050-2051).

The court will bear in mind in this connection that the work *under the original specifications* necessitated overtime, and that this $2,000 allowance is in addition to the overtime which would properly be covered by the contract. Gray says, in referring to the original specification work. "You would have to have overtime on a job like that. No man in the world could handle that job without some overtime, to some extent" (VII, 2420). Furthermore, the second bid of the Union Iron Works also points to the same conclusion, where it reads: "This price includes the necessary overtime to complete repairs within the time specified" (Respondent's Ex. Matson #6, VII, 2676). It is true that Mr. Heynemann on cross-examination (VI, 2120) says that this $2,000 includes not only overtime but the difference between the hours actually worked by the workmen and the hours actually charged for in libelant's bill, but, we submit, that the principle remains the same,—the $2,000 allowance was in the nature of a bonus to cover *any* unforeseen matter which might have been *in libelant's favor.*

Besides allowing libelant's own figure on the original specification work, which was considered "*a reason-*

able price'', (Gardner, VI, 2281) the experts, in figuring the value of the labor and material used on the extras, adopted libelant's *own* rates for the same as shown on its bill (Id., 2214), and these rates were liberal "over and above cost and carried a good profit with it" (Id., 2338; see also Id., 2340).

The original estimate made by these men, completed some time prior to April 29th, 1910, was reported to the respondent in a letter of that date. Subsequently, after further information from Klitgaard and Kinsman with reference to certain of the items figured on, and after examining the vessel in drydock, they revised their estimate to accord with the new information, making appropriate credits and debits and, after striking a balance, found that there was practically no change to be made in the final result which had been first arrived at (Heynemann, VI, 2103-2107,2179, 2185; Gardner, VI, 2268-2270).

As we have before stated, each of the 140 items of the billhead was the subject of the examination of both these witnesses, and there were one or two items wherein their testimony did not accord. This fact, considering that these gentlemen were testifying largely from memory as to these numerous matters of detail which had come under their observation and knowledge many months previous, should not lessen the value of their testimony; in fact, that their memories were not in exact accord should be counted rather to their credit. In reference to this matter of discrepancy in their testimony we find the following:

Q. If there are differences in the testimony which you have given as compared with the matter contained in Heynemann Exhibit No. 4, relative to your action in allowing this or that item as an extra, or not allowing it, have you any explanation to make of that difference, or those differences?

A. To the best of my knowledge and belief those differences are covered by the reconsideration of the estimate previously referred to.

(Gardner, VI, 2269; see also, Id., 2270.)

The point is that after Gardner and Heynemann had their final conference over the question of the value of these repairs, their opinions were in perfect accord.

Q. State whether or not after your final conference with Mr. Heynemann, you and he were in accord as to all of the items contained in "Kinsman Exhibit No. 2."

A. To the best of my knowledge and belief we were.

(Id., 2269.)

In concluding the discussion under the head of values we wish to call the court's attention to the conditions under which the work of these men was done, and the time spent and pains taken by them in arriving at a fair conclusion. In speaking of estimating the value of *completed* repair work Mr. Gardner says:

A. I don't recall that I ever had an opportunity to estimate as thoroughly on a job as I have had on this particular one, the work having been performed, and it being possible to see the major portion of it; in fact, see a great deal more possibly than one would ordinarily see in bidding on the work; surely quite as much as the man who was bidding on the work would have seen.

(VI, 2221-2222.)

And the fact that the work was *completed* and not *contemplated* added to the accuracy of their estimate.

Q. What is the comparative advantage to the man who bids or estimates the value of work he has seen, work that has been accomplished? * * * * * * I will add: as against work that has not been accomplished but which is to be done.

A. There is an element of time that should be taken into consideration in replying to that question as in estimating on work on which one is requested to bid, you are usually hurried, due to the fact that the man desiring this work is anxious to obtain the use of his vessel or engine, whatever it may be. This condition, of course, in making this particular estimate, did not obtain as there was no rush but ample time given to go over every detail very thoroughly, therefore in reply to your question I should say that the advantage in making an estimate after the work has been performed as compared with making an estimate for the purpose of making a bid would be a very great advantage.

* * * * * * *

A. (Continuing.) I should say the man has a great advantage in making an estimate after the work has been performed over a man making an estimate before the work has been performed, for the purpose of bidding on it.

* * * * * * *

A. He has an advantage in that there is no necessity for making an allowance for unforeseen contingencies which is usually allowed in making an estimate before the work is performed. You really do not know in many cases what will be necessary. The work having been performed, it is very evident what has been necessary and what has been performed.

Q. Then the advantage is a matter of accuracy?

A. A matter of accuracy in preparing an estimate.

(Gardner, VI, 2222-2223.)

Heynemann add his testimony on this point:

Q. By comparison with your past experience in estimating the value of the work, repair work, what were the facilities open to you in making the estimate on this particular work?

A. I considered that in making an estimate for general repair work, and not knowing what you were going to strike, is an entirely different proposition from making an estimate after the work has been performed and when a list is given to you stating exactly what work was done.

Q. Which is the more accurate method of estimating?

A. Certainly the more accurate method of estimating is after the work has been done, and you are then presented with a full list of this work. In estimating on repair work, very often you allow yourself a margin for safety, and for such work as you may be led into through necessity, and that you are not able to see, and for that reason the estimates vary very considerably on the same specifications.

Q. Before the work is done?

A. Before the work is done.

* * * * * * *

A. I would also further state that I don't remember having spent as much time on ever making any bid as I have in looking up this work, making an estimate of this repair work.

Q. I want to know what the facilities for doing so were as compared with your past history.

A. Well, the work was very accurately described; much more so than it would be if we were called on simply to make a bid, and we had much more time to go into the matter thoroughly than we would in the ordinary course of business in making a bid.

(Heynemann, VI, 2049-2050.)

Mr. Gardner was originally employed in the work and, before Heynemann was known in the matter, had

already made a study of the repairs and visited the ship five or six times (VI, 2209).

> A. On each of these visits, I believe, as near as I can recall at the present time, I spent an average of 8 hours, possibly more. I think it is safe to say that I averaged that length of time on each visit.
>
> (Gardner, VI, 2212.)

Subsequently, and after Mr. Heynemann's services had been secured, the examination of the work covered eight or nine visits of about the same duration.

> A. Well, I would say that the length of time would average about the same per visit that had been consumed while I was making visits alone. Of course, it is to be borne in mind that this was quite a long time ago and taxing one's memory as to such a length of time, it is a little difficult to recall positively, but it is as I recall it now.
>
> (Id., 2212.)

On one occasion we find Mr. Heynemann spending a Sunday there alone (VI, 2021; Kinsman, V, 1864). Kinsman says that during one of the stays of the vessel in this port between April 22nd and May 4th, 1910, these men spent thirty hours there and, when the witness is asked how he remembers it was thirty hours, says:

> A. Well, I remember keeping track of it there at one time because I was getting kind of tired of it.
>
> (V, 1863.)

Kinsman also says that on one occasion they kept him there until late at night (Id., 1863); that he had orders to show the repair work to them (Id., 1855), and his

testimony as to what he did in compliance with this order is shown at pages 1856 to 1861 of Volume V of the record. He showed them the work "many times" (V, 1862).

That it was possible to so point out this repair work at such time is vouched for by libelant's night foreman Nelson, who visited the engine room of the "Hilonian" a few days before *September 19th, 1911,* which was the date of his testifying in the case.

> Q. You could still distinguish the work, could you?
>
> A. I could. If the ship was here I could point it out to you.
>
> Q. All the work that was done?
>
> A. All the work that was done under my supervision at night, and I think most of it that was done in the daytime.
>
> (Nelson, IV, 1208.)

Besides Heynemann and Gardner, Klitgaard estimated the value of this work, and he was a man who was present during its progress and was familiar with it *"as it had been done"* (VI, 1969). His qualification as an expert is to be found at pages 1913 to 1917 (Vol. VI). His estimate is $23,156.00 including an allowance *in full* of all the Schedules from 4 to 10 except Schedule 4, where a partial deduction was made (VI, 1968, 1969). This the court will see is an estimate as to Schedule 1 *entirely independent of the original contract.* Mr. Klitgaard was given a copy of Schedule 1 and the other attached schedules and asked for a figure (VI, 1970; VII, 2703). At first he objected to estimating on the bill because of his friendship for

Mr. Gray (VI, 1973), a friendship which had been personal for a number of years (VI, 1923) and which led him, after making his estimate, to tell Gray the figure (Gray, VII, 2464-2466). Klitgaard was not in respondent's employ at the time and had not been since his resignation as chief engineer of the "Hilonian". It would seem, we submit, that no fairer man for the libelant could have been selected to place a value on this work, a value from libelant's viewpoint, in that it is figured entirely *on the basis of a quantum meruit.* Klitgaard knew the work *"as it had been done",* and this, we take it, covers one of libelant's main objections to Gardner and Heynemann.

In conclusion, we submit that our proof of value, viewed from any standpoint, is shown to have been fair and impartial and the best that could be offered under the circumstances of the case. On the basis of a quantum meruit the estimate is made by a personal friend of Mr. Gray, and on the basis of a contract it is made by a man whose sympathies were with the libelant from the start, not only because of his friendly relations to its officers but also because of his being "a shop man" as distinguished from an owner.

We now desire to lay before the court a statement of what we believe to be the law as to damages, where a contract is made and later by mutual consent is departed from in certain respects.

In *I Addison on Contracts*, pp. 585-586 (cited in 6 N. Y. Supp. 662, 664), it is said:

> "If work has been agreed to be done, and materials supplied under a building contract for a

certain estimated price, and there has subsequently been a deviation from the original plan by consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, as far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging, but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say what part of it shall be applied, the workmen may charge for the whole work by measure and value, as if no contract at all had ever been made."

In *2 Sedgwick on Damages,* 8 ed., Sec. 635, it is said:

"Where work is done under a special agreement at estimated prices, and there is a deviation from the original plan, by the consent of the parties, the contract is made the rule of payment as far as it can be traced, and for the extra labor the party is entitled to his quantum meruit."

And the same author says in the same section at page 362:

"Nor, it seems, should extra work, either in quantity or quality, unless done under an express agreement or on a statement of the price, be charged for at a greater rate in reference to the market value of the work contracted to be done."

Field, in his work on damages, Sec. 343, says:

"In cases of deviation from the stipulations of the original contract by mutual agreement between the parties, the contract prices govern, so far as the work can be traced according to the stipulations of the original contract; but if extra work is done, not provided for in such contract, and to which its provisions as to prices cannot be applied, the employe may recover therefor, as on a quantum meruit. A deviation by consent

may be treated as a new contract, so far as the deviation is concerned, and a modification of the original in that respect where the circumstances require it."

Page, in his work on Contracts (Vol. III, Sec. 1339), says as regards new contracts:

"To operate as a discharge in the absence of express agreement to that effect, the new contract must be clearly inconsistent with the continued existence of the original contract."

And in the next section the same author says:

"Modifications in a building contract do not abrogate it entirely, as long as the alterations and changes leave it possible to follow the original contract."

In *Menne v. Neumeister,* 25 Mo. App. 300, 305, the court says:

"The defendant here holds to the idea that if, in a suit on a written contract, it appears that some of the original terms were, by mutual consent of the parties departed from in the performance, there can be no recovery on the contract. Such is not the law. The party charged is simply released from his obligation to perform the modified terms in their original shape, but the rest of the contract will still be subject to enforcement as if no modification had intervened."

In *Norton v. Browne,* 89 Ind. 333, 336, it is said:

"Where parties enter into a contract for work and labor, and in doing the work there is a departure from the contract, mutually assented to by the parties, the contract may still be used to determine the value of the work so far as it can be followed, but no further."

In *H. E. etc. Ry. Co. v. Snelling,* 59 Texas 116 (cited with approval in 158 Cal. at p. 323), there was a contract to construct 15 miles of defendant's road for $47,500. After the making of the contract, the railroad changed the line of its road for ten of these miles and it was constructed at greater expense. The court says at p. 121:

> "But in case of such deviation from contract, by consent, which completion upon the new line by the contractor, without protest, would seem to imply, it would seem that the original contract, so far as can be, should regulate the price for the work; and that when this cannot be done in reference to the whole work, that then, as to the extra work, the contractor would be entitled to recover upon a quantum meruit. * * * The appellee was entitled to recover what the reasonable value of the additional work was, and that would simply be what it would have cost the appellant or any other person without extravagance or want of due care and skill, to have had the work done."

In *Hollinshead v. Mactier,* 13 Wend. 276, 277, the court says:

> "In Pepper v. Burland, Peake, N. P., 103, Ld. Kenyon said, if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract and say to what part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no contract at all had ever been made; but so far as the work was done according to the special contract, the price shall be regulated by the contract. The rule thus laid down by Ld. Kenyon was adopted by this court in Dubois v. Can Co., 4 Wend. 289, and according to it the report of the referee is right."

This case is also interesting by reason of the nature of the proof of value offered. The court says:

> "The principal objection to the report is, that the plaintiff did not prove his demand otherwise than by *estimates.* His proof consisted of examinations of the house by experienced master builders, and *estimates by them of the value of the work and materials.* This was competent testimony and in this case entirely satisfactory."

Brigham v. Hawley, 17 Ill. 38;

McClelland v. Snider, 18 Ill. 58;

Wheedon v. Fiske, 50 N. H. 125, 127.

Another case is that of *Goodwin v. McCormick,* 6 N. Y. Supp. 662, which seems peculiarly in point.

In *O'Connor v. Dingley,* 26 Cal. 11, the court says at p. 21:

> "All the cases hold that in an action brought in general assumpsit, in consequence of a deviation from the terms of the contract made by consent of the parties, the plaintiff may, and should, introduce in evidence the contract, and if it has not been wholly lost sight of in the services as performed, the rates and terms of compensation fixed in the contract will be the measure of damages, so far as the same can be traced in the performance. He must, of course, prove the performance of all his part of the contract, except so far as the same has been deviated from by consent. The contract therefore does constitute the basis of the action, and if there is any meaning in the rule that the evidence offered must correspond with the allegations, there can be no question that, according to the rules of the Practice Act requiring the facts to be stated, the contract should be set forth in the complaint, together with the necessary allegations of deviations, performances, etc., which the plaintiff must prove instead

> of the general allegation that the defendant is indebted to the plaintiff for work and labor, etc."

A later California case is *City Street Improvement Co. v. Kroh,* 158 Cal. 308, where it is said (pp. 323-324):

> "In cases where extra work is caused by authorized deviations from a building contract, and no agreement is made regarding the price thereof, or payment therefor, the law implies an agreement by the owner to pay the reasonable value of the extra work. In Dubois v. Del. & H. C. Co., 4 Wend. (N. Y.) 291, it is said: 'Where work is done under a special contract at estimated (stipulated) prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is to be the rule of payment as far as the special contract can be traced; and for the extra labor, the party is entitled to his quantum meruit'."

We submit that both in California and elsewhere the rule is clear that, where contract work can be traced and distinguished from extras, the contract must prevail, although the extras should be figured on a quantim meruit.

V.

COSTS.

We finally submit that the lower court erred in taxing the costs against respondent (Assignment of Error No. 10, VII, 2628).

The awarding of costs in admiralty is a matter resting solely in the discretion of the court, and there is no

branch of the law in which that discretion is more freely exercised.

1 Encyc. Pl. & Pr. 200;

1 Cyc. 908;

Hughes on Admiralty, p. 365.

In *Benedict's Admiralty,* 4 ed., Sec. 488, the learned author says:

> "What are proper items of disbursements is one thing. Whether they are to be allowed as costs against a party to the suit is quite another. And in this matter the court of admiralty has always exercised the widest latitude. Costs are always in the discretion of the court, and while, in most cases, the award of cost follows the decree, this is only because the court, in its discretion, allows it to be so. The court has entire power to decree for a party to the full amount claimed, and yet award costs against him, or to divide the costs, or to refuse costs altogether. Circumstances of equity or inequity, of hardship or of negligence, induce the court in many cases to depart from the rule that costs follow the decree. The disposition of the costs of the suit is often used by the court as a means of amercing either of the parties for misconduct or for inducing unreasonable and unnecessary litigation. Such matters vary with the varying circumstances and equities of particular suits, and numberless instances can be found in the reports, only a few characteristic cases being cited here."

In the case of *The Asiatic Prince,* 103 Fed. 676, 678, it was held that where litigation between the parties appeared to be unnecessary, and was caused by the unreasonable conduct of both parties, each party should be required to pay its own costs. The court says in part:

> "The libelant tried to coerce the claimant to pay a sum that was not due nor reasonable, and the claimant, in irritation, failed in legal duty. The result has been an unnecessary and troublesome litigation, and the court emphasizes its disapproval by withholding costs from the libelant, and compelling each party to pay the costs incurred by it."

In the case of *The Ashland,* 19 Fed. 651, 652, each party was charged with unnecessarily encumbering the record. The court found the charge to be correct and on that account compelled each party to pay its own costs.

In *The Elton,* 135 Fed. 446, the libelant by misrepresenting the true state of affairs, made more evidence necessary and he was held to pay for the same, although the successful party.

These cases clearly show that the court has power to award costs against a party who unnecessarily encumbers the record and puts an undue burden upon the court. We suggest that this is exactly what the libelant has done in this case.

So also it seems to be well settled that where a libelant recovers on another issue than that made by his pleadings he should not recover costs.

The E. A. Shores, Jr., 79 Fed. 987;
The Rapid Transit, 52 Fed. 320;
The Plymouth Rock, 12 Fed. 927.

We believe that this also is shown to be the fact in the case at bar.

So also where the respondent succeeds as regards the only subject really in controversy, it is held that he

should recover costs even though no technical tender was made.

The Sebastian Bach, 12 Fed. 172, 173.

In the case at bar respondent has always been ready to pay libelant its contract obligations and the reasonable value of the extras. Libelant has steadily refused to deal with it on these terms, and has insisted on payment on a quantum meruit basis. If respondent succeeds on the issue of a contract it should recover its costs. A tender is appropriate where the theory of a case is admitted and the question is merely one of amount. In the case at bar, however, the whole theory of libelant is disputed and it can only recover, if at all, on a set of facts wholly at variance with its pleadings. In the state court it probably could not have recovered at all without amending its pleadings and, if it recovers here, it can only be because of the liberal rules of pleading in the admiralty. In any event a tender in a suit brought on a wrong theory would seem inappropriate.

Another principle of the admiralty is that excessive claims are often visited with costs.

24 Encyc. Law, 1207, 1208, and cases there cited.

We believe that the court will find that the amount claimed by libelant in this case is excessive.

Finally we wish to call the court's attention to the language of Judge Betts in *Shaw v. Thompson,* 21 Fed. Cas. p. 1204:

> "A court of admiralty in exercising its discretion in the disposition of the costs of suit, will look

to the substantial rights and equities between the parties, rather than to the mere result of the litigation."

What, now, are the facts? The action is one for labor and material valued by libelant at $34,737.72. Such suits have been brought before but have never, so far as we are aware, given rise to any record such as this. Libelant's case (direct and in rebuttal) covers 1808 pages of the printed record and took 35 days to present. Sixty-five witnesses were called. Respondent's case, on the other hand, covered 687 pages and took 12 days to present. Nine witnesses were called. Libelant introduced probably more than 2000 exhibits consisting of time and material cards. These time cards contained numerous items in no way connected with the work on the "Hilonian", and the whole of each of such cards was put in evidence without any segregation of the material portions which could have been read into the record.

As regards the shop work proof, Adamson's testimony as to 15 of the workmen is duplicated by the calling of the workmen themselves.

Let us next consider the delays of the libelant in bringing the case to a close. It began putting on testimony on August 15th and continued so doing with regularity till September 15th. There was then an adjournment till September 19th. Hearings were had on September 19th and 20th, and on September 21st a continuance was had at libelant's request till September 27th. On that day libelant's counsel announced that he was going to Los Angeles and there was an

adjournment at his request till *October 5th.* On that day, after one witness had been examined, the following proceedings were had:

Mr. McClanahan. When are you going to again proceed, Mr. Frank.

Mr. Frank. Just as quickly as I can get my witnesses.

Mr. McClanahan. That is entirely unsatisfactory.

Mr. Frank. I know. It is unfortunate.

Mr. McClanahan. I have got to have from you some definite statement as to the time you will take to finish the case, or I will have to apply to the court to limit it. It is embarrassing to my client; it is expensive to my client; it is embarrassing to me to have this thing dragging on in this way. It seems to me that with the time and continuances that you have had you ought to have some definite idea as to when you can finish.

Mr. Frank. There are some things Mr. McClanahan, that I do not wish to put in the record at this time. As you have just now put your speech in the record which would perfectly justify me in doing what I am. If the time ever arises for the explanation I will make it. I am doing everything I can to get the witnesses but I have been embarrassed by certain circumstances beyond my control and which could not be anticipated. I can let you know tomorrow. I cannot let you know today.

Mr. McClanahan. That is, you can let me know tomorrow what?

Mr. Frank. When I can go on.

Mr. McClanahan. That is not altogether satisfactory. When are you going to finish?

Mr. Frank. Just as quickly as I can get my case in.

Mr. McClanahan. What is your idea as to that?

Mr. Frank. It depends entirely on whether we can get these witnesses that we are seeking. I sug-

gest, as today is Thursday, that we continue this until Monday morning, and I hope at that time to be able to go on.

Mr. McClanahan. Will you limit yourself until the close of next week to close your case?

Mr. Frank. There are three holidays next week. I will let you know Monday morning. I am not in a position to give you that definite answer that you want. Probably I will be on Monday. I am pursuing investigations that are not ripe and I cannot tell you. I am doing the best I can.

Mr. McClanahan. I give you notice now, Mr. Frank, that if on Monday you cannot give me some definite statement as to when you expect to close your case I shall apply to the court for a rule limiting your time.

Mr. Frank. All right.

Mr. McClanahan. And I now enter my protest at this continuance until Monday. I do not do that because I like to, Mr. Frank. We have one witness whom we have held here for weeks paying his salary.

Mr. Frank. Is this for the record also?

Mr. McClanahan. Yes. And it is unfortunate that we have been so delayed.

Mr. Frank. I have offered to let you take his testimony at any time you wanted to. You could have done that just as easily as not. It is not necessary to detain him. Of course, if you wish to do so it is your privilege.

Mr. McClanahan. You do not know my case. This witness's evidence may depend on yours.

(IV, 1362-1364.)

On October 9th libelant's counsel announced that he was unable to proceed because he could not get his witnesses and would, therefore, adjourn till October 11th. Respondent duly protested but to no avail. On October 11th counsel for libelant announced that he

would have to adjourn till October 14th owing to lack of witnesses. Respondent objected and gave notice of a motion for an order limiting time. The hearing again went on on October 14th, and on October 16th the parties appeared before the court on the motion for an order limiting time. We ask the court to examine the proceedings had at that time (IV, 1416-1420), which closed by the court's remarking, " I can-" not conceive why it takes so long to put in testimony " in an ordinary action like this. It seems to me that " 10 days to close this case now, 10 days for the " defense, and 5 days for rebuttal is sufficient. I " cannot conceive why it is not sufficient". The order was made accordingly.

Libelant finally closed its case on October 27th, and respondent proceeded continuously with its case from October 30th till November 9th. We may remark in this connection that about four of these days were taken up in the cross-examination of respondent's witness, Heyneman (Proceedings of Nov. 4, 6, 7 and 8). On November 9th a continuance was taken for the accommodation of the witness, Gardner, till November 14th, and on November 14th respondent requested an adjournment till November 18th, owing to its counsel being forced to go to trial in a case in Redwood City. In the meantime, on November 7th, the parties had come before the court again on questions as to the admissibility of certain testimony, and respondent's counsel called attention to the lengthy cross-examination indulged in by libelant and again requested that the time be limited. A new limit was accordingly set of

ten days for direct testimony of respondent and ten days for cross-examination. The following occurred, inter alia, on these proceedings:

> Mr. McClanahan. If counsel will permit me, I want to make the suggestion to the court that I be limited to hours instead of days in the matter of putting in my direct testimony, and that counsel be limited to hours instead of days in the matter of cross-examination. I do not see where this case is going to land us. It is a veritable Marathon. There are 1750 pages of record so far. I do not want to put myself in the position where I have overstepped the order of this court. I think the record will show that part of my time was used by counsel improperly; for instance, on two occasions in my case counsel deliberately adjourned the hearing in order to inspect such documents as had been introduced. On one occasion, I think, for three hours, and on another one hour.
>
> The Court. I shall not make any order limiting the cross-examination. You can have what time you think you desire to put in your direct testimony. If there does not seem to be any need of cross-examination, and if it goes on very long, I will entertain a motion to check it in some way. I do not myself think there is any necessity for taking 1700 pages of testimony in a case of this kind. I do not have any idea what it is, but in a simple suit on account for work and labor I do not think there is any necessity for it. I shall not make any ruling at this time any further. What time do you desire.
>
> (VI, 2141-2142.)

Respondent finished with the direct examination of its last witness on *November 18th* (VI, 2283) and no further proceedings were had till *May 1st* (Id., 2285),

when libelant cross-examined this witness and started its rebuttal. Libelant's rebuttal closed on May 9th.

Is it not clear from this showing that libelant should pay the costs. In a simple suit for labor and material it has encumbered the record with unnecessary testimony. The test of its recovery, if on a quantum meruit, is the *reasonable* value of the work and material, yet as regards shop work, it went into the most minute details. If it had done the same as to the ship work we know not where the case would have ended. In a suit of this kind the court does not require proof of the character offered by libelant for, if it did, it would swamp the machinery of justice. If libelant wanted to prove its case by showing the *cost* of the work it should have been able to have done so through a competent timekeeper. If it could not do this, it, and not the respondent, should pay the penalty of its lax method of doing business. To stamp with approval the method of asking every available man the details of the time spent on the work is to encourage trespassing on the court's time, and unless disapproved, we predict will be pursued again. The court itself would not have permitted the accumulation of a record such as we have here, and the fact that a reference was ordered, should not be taken advantage of, and made the occasion of abuse.

Furthermore, we contend that the dilatory tactics of the libelant should also be considered in connection with this question of costs. From August 25th to October 22nd respondent's counsel was kept waiting. The record shows the snail like pace at which the case

proceeded and the numerous continuances arbitrarily forced by libelant. Respondent repeatedly protested and repeatedly urged the inconvenience to which it was being put. The record speaks for itself in this matter and we feel that the penalty we ask to have invoked is altogether too small to meet the offense.

Leaving aside, however, the question of the size of the record and libelant's delays, we submit that as it cannot recover on the issue made by its pleadings, for this reason it should pay costs under the cases heretofore cited. Libelant sues on a quantum meruit and, if respondent has proven a contract, then its recovery must be based on that contract. It has failed to uphold its theory of the case and must recover upon the one established by respondent.

But our contention goes further than this: If there was a contract, then it was incumbent on libelant to prove *only* the work done *outside* the contract, which would have greatly shortened the record. Not only did it not do this but its failure to segregate the work forced upon respondent this burden and we assure the court it was a considerable one, as may be judged by the testimony of Heynemann and Gardner. It would have been a very simple matter to have first tried the issue as to whether there was a contract and to have then proceeded accordingly. But, instead of this, libelant chose to ignore this vital question and proceeded with its proof of all the work in the most cumbersome and expensive method conceivable.

Furthermore, if respondent has succeeded as to the main subject of controversy, namely: whether there was a contract, we submit it should clearly not be taxed with costs; indeed, the mere half way expedient of denying costs to the libelant would not meet the situation, for we believe that respondent should, in addition, be given its costs.

We also submit that the lower court erred in taxing as costs against respondent witness fees and mileage of witnesses, who attended before the commissioner without being under subpoena (Assignment of Error No. 11, VII, 2628). These costs alone amounted to $132.50 (VII, 2605-2614). The Revised Statutes, § 848 (7 Fed. Statutes Ann. 1124), provides that for each day's attendance in court or before any officer *"pursuant to law"* there shall be paid a witness fee of $1.50 and mileage at five cents a mile. It is admitted that the law on this subject is in dispute, but the practice in the districts for California has been against the taxation of such costs. Thus in *Spaulding v. Tucker,* Fed. Case No. 13, 221, Judge Sawyer, Circuit Judge for the Northern District of California, held that witness fees and mileage were not taxable where a witness appeared voluntarily and not under subpoena, as the words "pursuant to law" meant under process of some court. In *Haines v. McLaughlin,* 29 Fed. 70, the same judge reaches the same conclusion despite certain decisions in other circuits to the contrary. And in *Lilienthal v. So. Cal. Ry. Co.,* 61 Fed. 622, 623, Judge Ross announces the same rule as being well settled in

this circuit. Although we have not found any decision by this court, we submit that this long settled practice is not only in accordance with the law but that it should not now be disturbed.

We have perhaps dwelt too long on this subject, but these costs aggregate several thousands of dollars and we would fail in our duty were we to fall short in presenting to the court the whole story.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.

Note.—It will be noted that by stipulation in this Court (I, p. 2) appellant agreed to print as an appendix to its brief all stock cards and time cards on which it made any specific attack. Subsequently, however, a stipulation was entered into for the withdrawal of these stock cards and time cards for the use of both parties and hence appellant, with the consent of appellee's counsel, has not yet printed such cards, which would involve an enormous and unnecessary expense. Counsel for appellee is to notify us if he wants any of such cards printed and, upon such notification, we will comply with the same. Probably such a course will not now be necessary, however, in view of the ready reference to the original cards themselves.

APPENDIX I

Showing instances of contract work charged to Schedule I of libel.

CONTRACT COVERED BY SCHEDULE 4.

Piston Rods, Thrust Collars and Spring Bearings.

(Job number 5295 on schedule.)

					Charged to No.
Adamson's Ex.	26	Sept.	4	"Piston rods"	5295
" "	26	"	3	"Piston and rods"	5295
" "	26	Aug.	30	"Piston and rods"	5295
" "	26	Sept.	9	"Piston rods"	5295
" "	26	"	8	" " etc.	5295
" "	30	"	3	"Piston"	5295
" "	30	"	4	"Piston guides"	5295
" "	43	Aug.	31	"Pistons"	5295
" "	70	Sept.	17	"Piston rod"	5295
" "	71	"	13	"Piston rods"	5295
" "	72	"	1	" "	5295
" "	72	Aug.	31	"On piston"	5295
" "	72	"	30	"Piston rods"	5295
" "	74	"	28	" "	5295
" "	76	Sept.	6	" "	5295
" "	100	Aug.	27	" " and guides	5295
" "	101	Sept.	8	" "	5295
" "	101	"	9	" "	5295

(See Kinsman, V, 1889; Klitgaard, VI, 1958, 1961.)

Adamson's Ex.	10	Aug.	30	"Babbitting thrust collars"	5295
" "	10	"	31	"Thrust collars"	5325
" "	10	Sept.	1	" "	5325
" "	23	"	20	" "	5295
" "	24	Aug.	31	"Thrust rings"	5325
" "	26	"	31	"Thrust collars"	5325
" "	26	Sept.	1	" "	5325
" "	26	"	4	" "	5295
" "	43	Aug.	31	" "	5325
" "	52	"	30	" "	5295
" "	52	"	31	" "	5325
" "	54	Sept.	21	" "	5295

					Charged to No.
Adamson's Ex.	72	Aug.	31	"Thrust collars"	5325
" "	81	"	30	" "	5295
" "	86	Sept.	4	"Thrust block collars"	5295
" "	94	"	4	"Thrust collars"	5295
" "	107	Aug.	31	" "	5295
" "	108	Sept.	4	"Horse shoe thrust bearings"	5325
" "	113	"	17	"Thrust brasses"	5325
" "	118	"	1	"Thrust collars"	5295
" "	133	Aug.	30	"Babbitting horse shoes"	5295
(Kinsman, V, 1893; Klitgaard, VI, 1961.)					
Adamson's Ex.	43	Sept.	4	"Spring bearings"	5325
" "	43	"	3	" "	5325
" "	52	"	2	" "	5325
" "	52	"	2	" "	5295
" "	52	"	3	" "	5325
" "	52	"	4	" "	5325
" "	52	"	6	" "	5325
" "	52	"	8	" "	5325
" "	58	"	6	" "	5325
" "	76	"	3	"Shafting and spring bearings"	5325
" "	79	"	2	"Spring bearing babbitting"	5325
" "	79	"	3	"Spring bearings"	5325
" "	79	"	4	" "	5325
" "	91	"	8	" "	5325
" "	107	"	3	" "	5295
" "	107	"	4	" "	5295
" "	118	"	3	" "	5325
" "	118	"	4	" "	5325
" "	118	"	7	"Main spring bearings"	5325
" "	122	"	5	"Spring bearings"	5295
" "	122	"	6	" "	5295
(Klitgaard, VI, 1963.)					

CONTRACT COVERED BY SCHEDULE 7.

(Job number 5401 on schedule.)

Adamson's Ex.	36	Sept.	17	"Reversing gear"	5398
" "	46	"	22	"Fitting reverse shaft"	5398

					Charged to No.
Adamson's Ex.	82	Sept.	17	"Hand wheel"	5401
" "	98	"	19	"Reversing screw"	5398
" "	99	"	17	"Reversing gear"	5398
" "	99	"	15	"Brake, etc."	5398
Reichold's	"(Dolan)"		20	"Bracket" "Hilonian"	5401
Shepard's	"(Dolan)"		15	"Details for brake"	5295

(Kinsman, V, 1890; Klitgaard, VI, 1959, 1963.)

CONTRACT COVERED BY SCHEDULE 8.

(Job number 5009 on schedule.)

Adamson's Ex.	8	Aug.	30	"Main brasses"	5295
" "	10	Sept.	3	"Journal boxes"	5295
" "	26	"	1	"Main bearings"	5295
" "	26	"	2	" "	5295
" "	26	"	3	"Brasses main bearings"	5295
" "	37	"	6	"Main bearings"	5295
" "	52	"	7	" "	5295
" "	52	"	11	" "	5295
" "	52	"	1	" "	5295
" "	52	"	10	" "	5295
" "	52	"	2	" "	5295
" "	52	"	8	" "	5295
" "	53	"	7	" "	5295
" "	53	"	6	"Bearings"	5295
" "	58	"	7	"	5295
" "	63	Aug.	29	"Main brasses"	5295
" "	63	Sept.	6	"Drilling steel plates for main journals. Threading and turning eye bolts for main bearings. Main brasses"	5295
" "	64	"	2	"Brasses main bearings"	5295
" "	64	Aug.	29	"Main brasses"	5295
" "	67	Sept.	7	"Crank pin brasses in main bearing boxes"	5295
" "	74	Aug.	27	"Bearings"	5295
" "	76	Sept.	7	"Main bearing brasses"	5295
" "	77	"	6	"Drilling main bearing brasses"	5295

						Charged to No.
Adamson's	Ex.	79	Sept.	1	"Main bearings"	5295
"	"	79	"	2	"Bearing babbitting"	5325
"	"	90	"	20	"Main bearings"	5398
"	"	91	"	8	" "	5295
"	"	97	"	6	"Main journal brasses"	5295
"	"	97	"	7	"Main journal and crank-pin brasses"	5295
"	"	97	"	8	"Crankpin brasses"	5295
"	"	100	Aug.	24	"Bearings"	5295
"	"	102	Sept.	3	"Main bearings"	5295
"	"	107	"	6	"Main bearing brasses"	5295
"	"	107	"	11	"Overtime on bearings"	5295
"	"	118	Aug.	31	"Bearings"	5295
"	"	118	Sept.	2	"Main bearings"	5295
"	"	118	Sept.	8	" "	5295
"	"	128	"	6	"Main brasses"	5295
Shepard's	"(Dolan)		Aug.	30	"Alterations on bearing for main bearings"	5295
Dolan	"		"	26	"Hilonian main bearing boxes"	5295
"	"		"	30	"Main bearing boxes"	5295
"	"		"	31	"Main box bearing change"	5295

(Kinsman, V, 1894; Klitgaard, VI, 1962, 1964.)

CONTRACT COVERED BY SCHEDULE 9.

Smoke stack. (Job number 5389 on schedule.)

H. Mockel's	Ex.	3	Sept.	8	"Smoke stack plates"	5360
Gardner's	"	3	"	8	"Smoke stack plate"	5360
Hagland's	"	3	"	8	"Smoke stack"	5360

SMOKE STACK MATERIAL CARDS.

A. Robinson's	Stock Cards	B1071	"Removing stack"	5360
"	"	B1078	"Stack taking down"	5360
"	"	B1087	"Stack"	5360
"	"	B1804	"	5360
"	"	B1894	"	5360
"	"	B1897	"Smoke stack"	5360
"	"	B3631	"Damper"	5360

				Charged to No.
A. Robinson's Stock Cards		B3635	"Damper"	5360
"	"	B5646	"Stack"	5360
"	"	B5658	"	5360
Taylor's	"	B9540	"Damper"	5360

CONTRACT COVERED BY SCHEDULE 10.

(Job number 5313 on schedule.)

Adamson's Ex. 17	Aug. 31	"Tube heads"		5295
" " 102	" 30	"		5295
" " 102	" 31	"		5295

(Kinsman, V, 1890; Klitgaard, VI, 1959.)

CIRCULATING PUMP CONTRACT.

Adamson's Ex. 7	Sept. 21	"Extension and brass tops for main and bilge injections"	5398

(Kinsman, V, 1892; Klitgaard, VI, 1961; Gray, VII, 2383.)

Adamson's Ex. 21	Sept. 20	"Fly wheel"	5295
" " 48	" 20	"Polishing fly wheel, circulating engine"	5295

(Kinsmon, V, 1893; Klitgaard, VI, 1962; Gray, VII, 2384.)

Adamson's Ex. 102	Sept. 10	"Nozzle for cir. pump"	5295
Dolan's "	" 4	"Hilonian cir. pump nozzle"	5295

(Kinsman, V, 1894; Klitgaard, VI, 1964.)

Adamson's Ex. 82	Sept. 17	"Cir. pump bearing"	5398